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Nov. 26. 1879
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~314.~~ 87.

WILLIAM G. PHILLIPS, APPELLANT,

vs.

BENJAMIN F. GILBERT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 5, 1876.

Pl.14

SUPREME COURT OF THE UNITED STATES

No. 314.

WILLIAM G. PHILLIPS, APPELLANT,

vs.

BENJAMIN F. GILBERT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Bill of complaint.—Filed June* 11, 1873.

In the supreme court of the District of Columbia.

WILLIAM G. PHILLIPS, COMPLAINANT, *vs.* BENJAMIN F. GILBERT, WILLIAM H. WARD, Henry H. Dudley, Thomas Martin, The German-American Savings Bank, Horace Boughten & W. Bowen Moore, Robert E. Day, and Connecticut General Life Insurance Company of Hartford, Connecticut.	No. 3272. Equity docket, 12.

To the supreme court of the District of Columbia, holding an equity court for said district.

The bill of complaint of William G. Phillips, complainant, against the above named persons as defendants.

2 The complainant alleges and complains as follows:

1. That complainant is a resident of the District of Columbia, and the defendants Benjamin F. Gilbert, William H. Ward, Henry H. Dudley, Thomas Martin, Horace Boughton, and W. Bowen Moore are residents of the District of Columbia; the defendant The German-American Savings Bank is an incorporated body, doing business in the said District, and the president of which is ; and the defendant The Connecticut General Life Insurance of Hartford, Connecticut, is a body corporate under the laws of the State of Connecticut, but having a duly authorized resident agent in this district, and that one J. G. Bigelow is such agent, as complainant is informed and believes; and that the defendants Edward Parsons and Robert E. Day are residents of the city of Hartford, State of Connecticut.

3 2. That the complainant heretofore entered into a contract with the defendant Benjamin F. Gilbert to furnish the material for and build six brick houses for said Gilbert, on lots 123, 124, 125, 126, 127, 128, and the east 14 f't of lot 129, in said Gilbert's recorded subdivision of square 675, in Washington City, in the District of Columbia, of which said lots and part of lot said Gilbert was at the time the owner; and for the building of said six houses and furnishing the material therefor the said Gilbert agreed and contracted therefor—the said Gilbert agreed and contracted with complainant to pay him the aggregate sum of thirty-two thousand and two hundred dollars, being $5,700 for each of two of said houses and $5,200 each for four of said houses, and which sum was to be paid in instalments, an instalment to be paid every two weeks, of such amounts that at the time when each instalment should be payable the aggregate of the instal-

4 ments paid or payable should equal the value under said contract of the work done and materials furnished on said houses. And in pursuance of said contract the complainant has furnished materials for and done work in and about the construction of said houses to the value under said contract of sixteen thousand dollars, on which sum there is to be credited on account of money paid and property conveyed, &c., the sum of $11,000, leaving a balance now due to complainant of five thousand and twenty dollars for work and labor performed and materials furnished for and in and about the construction of said buildings.

3. That on the 23d day of May, 1872, complainant filed in the office of the clerk of the supreme court of the District of Columbia a notice of his intention to hold a lien on the above described lots and part of lot and houses thereon, under the provisions of an act of Con-
5 gress, approved Feb'y 2, 1859, entitled an act for the enforcement of mechanics' liens on buildings, and so forth, in the District of Columbia, which notice was recorded in said clerk's office in lien record No. 4, f. 72, and a copy of which notice is filed herewith, marked Exhib.t W. G. P., and to be taken as part hereof; at the time of filing which notice said building had been commenced but had not been and are not now finished.

4. That heretofore the said Gilbert and wife, by deed dated August 25th, 1871, conveyed certain lots to the defendant William H. Ward, and among others the west 11 feet front by the depth of lot 126, and the east 10 feet front by depth of lot 127, in said subdivision of square 675, in trust, to secure the payment a certain promissory note therein described and overdue, payable to order of the defendant Henry
6 H. Dudley, as will appear by reference to said deed as the same is recorded in Liber No. 656, fol. 387, et seq., one of the land records for Washington County, in the District of Columbia, and to which complainant prays leave to refer as part of this bill. And complainant is informed and so charges that a large part of said note has been paid, and that there is not due on it the sum named in it, and that all the property conveyed by said deed has been released from the trusts thereof except the said described part of lot 126 and 127.

5. That said Gilbert and wife, by deed dated April 29, 1872, conveyed lots 127, 128, and part of 129, in said subdivision of square 675, to said Ward, in trust, to secure the payment of a certain note of said Gilbert now overdue, payable to order of complainant, for the sum of three thousand dollars, as will appear by reference to said deed as the same is recorded in Liber 681, fol. 36, one of the land records, to which
7 complainant asks leave to refer as part hereof for a more full knowledge as to contents of said deed; the said note the payment of which was thereby intended to be secured was endorsed by complainant to the defendant Martin, who endorsed the same, as complainant is informed, to the defendant, The German-American Savings Bank, which is now the holder of said note, as complainant is informed, but he does not know whether any part thereof has been paid.

6. That the defendant the said Gilbert and wife, by deed dated 16th day of December, 1872, conveyed said lots 123 to 128 inclusive, and said part of lot 129, in said subdivision of said square 675, to the defendants Horace Boughton and W. Bowen Moore, as tenants in common, in fee-simple, as will more fully appear by reference to said deed as the same is recorded in Liber No. 700, fol. 482, to which complainant asks leave to refer as part hereof.

8 7. That the said Boughton and Moore made and recorded a new subdivision of the said lots and part of lot conveyed to them by said Gilbert as aforesaid into lots known as lots Nos. 263, 264, 265, 266, 267, and 268, in H. Boughton's subdivision of lots in square 675, which subdivision is recorded in the office of the surveyor of the District of Columbia, in Liber H. D. C. No. 1, fol. 164, to which complainant asks leave to refer as part of this bill of complaint.

8. That said Boughton and his wife, and the said Moore and his wife, by their several deeds, each dated February 1st, 1873, and recorded Feb'y 5, 1873, conveyed each of said six lots in Boughton's subdivision to the defendant Edward W. Parsons and Robert E. Day, in trust, to

secure the payment in each of said six lots the six certain promissory notes of said Boughton and Moore respectively described in each of said six deeds, and each of which six notes were payable to the order of the defendant The Connecticut General Life Insurance
9 of Hartford, Connecticut, five years after date, with interest at ten per cent. per annum, interest to be paid semi-annually; all of which will appear by reference to said deeds as recorded in Liber 707, fol. 261, et seq.; Liber 707, fol. 268, et seq.; Liber 707, fol. 271, et seq.; Liber 707, fol. 258, et seq.; Liber 707, fol. 264, et seq., and Liber 707, fol. 274, et seq., of the land records aforesaid, to which complainant asks leave to refer as part of this bill.

PRAYERS.

And the complainant prays as follows:

1. That the said six houses and the said lots 123 to 128, inclusive, and said part of lot 129, in said subdivision of said square 675, may be sold and complainant's claim paid out of the proceeds of such sale.

2. That for the purposes aforesaid all necessary accounts may be taken, inquiries made, and directions given.

10 3. That the complainant may have such other and further relief in the premises as the nature of the case may require.

4. That process may issue, directed to the defendants to this cause, requiring them to appear and answer, &c.

The defendants to this bill are—

1. Benjamin F. Gilbert.
2. William H. Ward.
3. Henry H. Dudley.
4. Thomas Martin.
5. The German American Savings Bank.
6. Horace Boughton.
7. W. Bowen Moore.
8. Edward W. Parsons.
9. Robert E. Day.
10. Connecticut General Life-Insurance Company of Hartford, Connecticut.

APPLEBY & EDMONDSTON,
Sol'rs for Compl't.

11 We consent that the foregoing bill be amended in paragraph 2, by inserting "sixteen thousand" in place of "fifteen thousand," and by inserting "five thousand" in lieu of "four thousand."

ENOCH TOTTEN,
Sol'r for Boughton & Moore & Gilbert.

EXHIBIT TO BILL.—W. G. P.

Notice of lien.—Filed 23 May, 1872.

WILLIAM G. PHILLIPS
vs.
BENJAMIN F. GILBERT.

WASHINGTON, D. C., *May 20th*, 1872.

Mr. Benjamin F. Gilbert to William G. Phillips, Dr.

1871.		
Aug't 20.	To contract for material and labor on four brick houses, at $5,200 each	$20,800
	To two brick houses, at 5,700 each	11,400
		32,200

On I street north, between North Capitol and First street east, on lots 123 to 128, inclusive, and all of 129 not dee d. to Wm. G. Phillips, in Benjamin F. Gilbert's recorded subdivision of square 675.

Credit to date—By cash	1,850	
" " " " brick	90	
" By lots 130, 131, part 129, in above square 675	2,720	
	4,660	
" By note, 60 days, dated Apr. 29, 1872	3,000	
	$7,660	7,660
		24,540
Note, 60 days, dated Apr. 29, 1872		3,000
		$27,540

12 To the clerk of the circuit court of the District of Columbia:

SIR: You will please file and record this my notice to Benjamin F. Gilbert, and to all whom it may concern, of my intention to hold a lien upon the buildings and lots upon which they stand, which is designated in my bill herewith set forth.

WM. G. PHILLIPS.

Summons to answer.—Issued June 11, 1873.

In the supreme court of the District of Columbia. June 11, 1873.

WILLIAM G. PHILLIPS, COMPLAINANT,
against
BENJ. F. GILBERT ET AL., DEFENDANTS. } No. 3272. Equity docket 12.

The President of the United States to Benjamin F. Gilbert, William H. Ward, Henry H. Dudley, Thomas Martin, the German American Savings Bank, Horace Boughton, W. Bowen Moore, Edward W. Parsons, Robert E. Day, and Connecticut General Life-Insurance Company of Hartford, Connecticut, defendants:

You are hereby commanded to appear in this court at its first
13 special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise, the bill may be taken for confessed.

Marshal's return.

Summoned B. F. Gilbert, W. H. Ward, H. Boughton, W. B. Moore, Otis Bigelow, agent of life ins. company.

A. SHARP, *Marshal.*

JUNE 11TH, 1873.

14 *Undertaking to discharge mechanics' lien.—Filed June* 25, 1873.

In the supreme court of the District of Columbia.

WILLIAM G. PHILLIPS
vs.
HORACE BOUGHTON, BENJAMIN F. GILBERT, & others. } Equity. No. 3272.

Bill to enforce mechanics' lien.

Horace Boughton, W. Bowen Moore, Benjamin F. Gilbert, J. G. Bigelow, W. J. Murtagh hereby undertake that they will pay any judgment that may be rendered (including costs) upon or on account of the claim for lien made by said William G. Phillips, and filed in the clerk's office of this court on the 23d day of May, 1872, on lots 123 to 128, inclusive, and all of lot 129 not deeded to Wm. G. Phillips, in Benjamin F. Gilbert's subdivision of square numbered 675, in consideration of the release from the effects of said claim for lien of the said lots and part of lot.

B. F. GILBERT.
HORACE BOUGHTON.
W. BOWEN MOORE.
J. G. BIGELOW.
W. J. MURTAGH.

Approved this 25th day of June, 1873.
By the court.

A. WYLIE.

15 *Demurrer of Boughton & Moore.—Filed Sep.* 8, 1873.

In the supreme court of the District of Columbia.

WM. G. PHILLIPS
vs.
BENJAMIN F. GILBERT ET AL. } 3272. Equity.

The joint demurrer of the said defendants, Horace Boughton and William Bowen Moore, to the bill of complaint of the above-named plaintiff.

These defendants, by protestation, not confessing any of the matters and things in the said bill of complaint contained to be true, in manner and form as the same are therein set forth, do demur thereto, and for causes of demurrer show:

First. That the said complainant hath not, in and by his said bill, stated such a case as doth or ought to entitle him to any such relief as is thereby sought and prayed for from or against these defendants.

Second. That the claim for mechanics' lien set forth in said bill is
16 insufficient and utterly void, because said claim is made in gross, upon six separate lots of ground, without specifically setting forth the amount claimed upon each building and lot for work done or materials furnished thereon.

ENOCH TOTTEN,
Counsel for said defendants, Boughton & Moore.

I certify that in my opinion the foregoing demurrer is well founded in point of law.

ENOCH TOTTEN,
Counsel for said Defendants.

DISTRICT OF COLUMBIA, *ss:*

I, William Bowen Moore, being first duly sworn, do depose and on my oath say that I am one of the defendants who interpose the above and foregoing demurrer, and that the said demurrer is not interposed for delay.

W. BOWEN MOORE.

Subscribed and sworn to before me this 8th day of September, 1873.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS,
Ass't Clerk.

17 *Answer of B. F. Gilbert.—Filed Sept. 9th*, 1873.

In the supreme court of the District of Columbia.

WILLIAM G. PHILLIPS
vs. } 3272. Equity docket, 12.
BENJAMIN F. GILBERT ET AL.

The separate answer of the defendant Benjamin F. Gilbert to the bill of complaint of the above-named complainant respectfully shows:

1st. The said defendant admits the allegations contained in the first paragraph of said bill.

2d. The said defendant, in answer to the allegations contained in the second paragraph of said bill, says that he denies that said complainant did work and furnished materials on said buildings of the value of fifteen thousand dollars ($15,000.00), and alleged the truth to be that such work and materials did not and do not amount to more than the sum of eleven thousand dollars ($11,000). Defendant further
18 alleges that the amount of payments made by him to said complainant for said work and materials was more than the sum of eleven thousand dollars ($11,000.00), and was the sum of eleven thousand and four hundred dollars ($11,400).

3d. The said defendant, further answering, says that he admits that said complainant on or about the 23d day of May, 1872, filed a paper writing in the office of the clerk of this court, purporting to be a claim for mechanics' lien in pursuance of the act of Congress of February 2d, 1859, but the said defendant is advised and believes, and therefore avers, that the said claim for lien is insufficient, unlawful, and void, because the same is made against the houses, lots, and parcels of land in gross without specifically setting forth the value of the work and materials put upon each house, and the said defendant asks that he may have the
19 same benefit and advantage from this insufficiency that he would have had if he had demurred to said bill.

B. F. GILBERT.

ENOCH TOTTEN,
Sol'r for said Def't.

DISTRICT OF COLUMBIA, *ss:*

I, Benjamin F. Gilbert, being duly sworn, do depose and on my oath

say that I have read the foregoing answer by me subscribed and know the contents thereof, and that the facts therein stated on my personal knowledge I know to be true, and those stated on information and belief I believe to be true.

B. F. GILBERT.

Subscribed and sworn to before me this 9th day of September, 1873.
[SEAL.] JOHN B. MOTLEY,
Notary Public.

20 *Replication to answer of Gilbert.—Filed Sept.* 16, 1873.

In the supreme court of the District of Columbia.

WM. G. PHILLIPS *vs.* BENJ. F. GILBERT ET AL. } 3272. Eq.

The complainant joins issue upon the answer of the defendant Benjamin F. Gilbert in the above cause.

APPLEBY & EDMONSTON,
Sol'rs for Compl't.

Answer of Conn. Gen'l Life Ins. Co.—Filed Dec. 19, 1873.

In the supreme court of the District of Columbia.

WILLIAM G. PHILLIPS *vs.* BENJ. F. GILBERT ET AL. } 3272. Eq. doc. 12.

The separate answer of the Connecticut General Life Insurance Company of Hartford, Connecticut, to the bill of complaint of the above-named plaintiff.

The said Connecticut General Life Insurance Company, for an-
21 swer to the said bill of complaint, says:

First. That the said insurance company admits that a loan was made by said company and secured on the lots numbered 263, 264, 265, 266, 267, and 268, in Boughton & Moore's subdivision of part of square 675, and the said company says that said loan amounted to $36,000.00.

Second. That when they made the said loan upon the security of the said lots, the said plaintiff, William G. Phillips, executed and delivered to said company a release in writing of the said lots from the effect and operation of the lien filed against said lots by him and mentioned in said bill of complaint, and that upon the faith of said release the said company made the said loan of money to Boughton and Moore, and the said insurance company says that said plaintiff ought to be estopped from proceeding upon said claim for mechanics' lien.

22 Third. That said discharge in writing of said lots from the operation of said lien was placed with the abstract of title of said lots, and that said discharge and release and said abstract have been lost or mislaid, and the said insurance company herewith files a substantial copy of said release of said lien.

And having fully answered, the said defendant prays to be hence discharged with its reasonable costs and charges.

CONNECTICUT GEN'L LIFE INS. CO.,
By J. G. BIGELOW, *General Agent.*

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Jonathan G. Bigelow, being first duly sworn, do depose and say that I am agent of the Connecticut General Life Insurance Company, the defendant above named, and was such agent at the time of the negotiation of the loan to Boughton & Moore, mentioned in the foregoing answer; that I have read the foregoing answer and know the contents thereof, and that the same is true as of my own knowledge.

23

JONATHAN G. BIGELOW.

Subscribed and sworn to before me this 19th day of December, 1873.
[SEAL.] JOHN B. MOTLEY,
Notary Public.

Discharge of lien.—Ex. to answer of Conn. Life Ins. Co.

WASHINGTON, D. C.,
January 10, 1873.

To the clerk of the circuit court of the District of Columbia:

SIR: You are respectfully requested to release the property owned by Benjamin F. Gilbert and located on lots 123, 124, 125, 126, 127, 128, and part of 129, in Gilbert's subdivision of square 675, from the mechanics' lien filed by me on or about the 23d day of May, 1872.

W. G. PHILLIPS.

24 *Amendment to answer of B. F. Gilbert.—Filed Dec.* 24, 1873.

In the supreme court of the District of Columbia.

WM. G. PHILLIPS *vs.* BENJ. F. GILBERT ET AL. } 3272. Equity dock. 12.

The amendment to the answer of Benjamin F. Gilbert to the bill of complainant in this cause, heretofore filed, shows as follows:

First. That he is informed and believes, and therefore charges, that the mechanics' lien claimed by the complainant, and sought to be foreclosed in and by said bill, was fully discharged and released by the said complainant in writing some time in January, 1873.

Second. That he is advised and believes, and thereupon avers, that said complainant, having so as aforesaid released and discharged his said claim for lien, can have no relief in a court of chancery, and that he, said complainant, has a full and adequate remedy at law, if

25 he has any claim against this defendant or against any of the defendants.

B. F. GILBERT.

ENOCH TOTTEN,
Sol'r for Deft's.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Benjamin F. Gilbert, being first duly sworn, do depose and upon my oath say that I have read the foregoing amendment to my answer and know the contents thereof, and that the same is true of my own knowledge, except as to matters and things therein stated on information and belief, and as to those matters I believe the same to be true.

B. F. GILBERT.

Subscribed & sworn to before me this 20th day of December, 1873.
[SEAL.] JOHN B. MOTLEY,
Notary Public.

We consent to the filing of this amendment.
APPLEBY & EDMONSTON,
Sol'rs for Compl't.

26 *Replication to amended answer of B. F. Gilbert, &c.—Filed Dec.* 26, 1873.

In the supreme court of the District of Columbia.

WM. G. PHILLIPS *vs.* B. F. GILBERT ET AL. } 3272. Equity.

The complainant joins issue upon the amended answer of the defendant Gilbert, and joins issue upon the answer of the defendant the Connecticut General Life Insurance Company.
APPLEBY & EDMONSTON,
Sol'rs for Compl't.

DEC'R 26TH, 1873.

27 *Testimony for Compl't.*

In the supreme court of the District of Columbia.

PHILLIPS *vs.* GILBERT ET AL. } In equity. No. 3272, doc.

For complainant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered, that at an examination of witnesses begun and held on the 8th day of January, A. D. 1874, and continued from time to time by adjournment until the 7th day of February, A. D. 1874, when the within depositions were taken, I, T. D. Anderson, an examiner in chancery, did cause to be personally present at the office of Appleby & Edmonston, in the city of Washington, in said District, the within named witnesses, to testify on the part and behalf of the com-
28 plainant, in a certain cause now depending in the supreme court of the District of Columbia, wherein W. G. Phillips is the complainant and Gilbert et al. are the defendants.

JAN'Y 8TH, 1874.

Met pursuant to agreement to take testimony for the complainant.

Present, Mr. W. E. Edmonston, complainant's solicitor, and Mr. Enoch Totten, defendants' solicitor.

Whereupon WILLIAM G. PHILLIPS, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and on the part of the complainant, deposes and says as follows, to wit:

I am the complainant in this suit. I know the defendant Benj. F. Gilbert. I had a verbal contract with said Gilbert to build six brick

houses on lot 123 to 128 inclusive, and part of lot 129, in Ben-
29 jamin F. Gilbert's recorded subdivision of square 675.

Int. State what the terms of that contract were, and about what time it was entered into?

Ans. I think the contract was entered about the latter part of August, 1871. The contract was to build six three story and basement brick houses; two of those houses were one story higher than the rest. The price was $5,200, and the price of the centre one was $5,700 apiece, making $32,200 for the whole. Up to June 11th, 1873, a part of this work had been done. As well as I can remember, all the brick work, excepting the coal vaults, areas, and lower part of the bay windows had been finished. All the excavating, excepting that for the vaults and bay windows, was done. A portion of the plumbing, that is the sewer-
30 age up the back of the houses, was done. All the slate work was finished. All the tin work except the tops of the bay windows was done. All the doors and window frames that were in were primed with one coat of paint on them. I believe all the joists and rafters were in. I think a few were put in afterwards. Most of the studding and bridging of the joist were in, or a good deal of it. A greater part of the flooring was laid, to the amount of at least $130. This refers to each house on an average. All the sheathing was done on the buildings except that on four bay windows. All the door and window frames excepting twenty-four were in—all except those with a bay window. All the material except the rails and ballisters for the stairways were got out, and these and most of the work up. Most of the partitions
31 were up. The lookouts and pieces for the cornice were up. I mean lookouts for the balconies. The top cornice was on. There were stone sills at the doors of all of them. All the blocks were worked into the walls, and the wash-boards, &c., were in.

The value of the work done up June 11th, 1873, according to the contract with Gilbert, was over $16,000, or over half the contract. The total amount of money I received on account of the contract and the work done up to the 11th of June, 1873, are as follows:

The total amount received, including ground conveyed and material received and money paid, was $12,080. By Gilbert, $500, $200, $300, $100, $250 and $200; and through Coburn, $500; bricks from Gilbert, $90. Lots from Gilbert, 130, 131 and part of 129, in square 675,
32 at 75 cents per foot, making $2,660. Mr. Hager drew up the deed and I supposed the lot was wider than it is. I received in cash from Mr. Gilbert, $50, $40 and $100; life insurance $90; draft March 25th, 1873, $1,000, from Boughton & Moore; by draft John N. Hubbard by suggestion of the agent, $1,000; two orders for lumber from Boughton & Moore, $2,000; then there was a note given by Gilbert of $3,000, which was afterwards paid, making $12,080 in all.

(It is admitted by defendants' counsel that the Ex. W. G. P. is a copy from the lien records of the supreme court of this District, and that the same was filed May 23d, 1872.)

Cross-examined by Mr. TOTTEN:

There was no stipulation in the contract with Gilbert as to the time when the houses should be completed. I was to commence about
33 the latter part of August. We commenced work on the last day of August or the first or second day of September. I think the year was 1871. Gilbert was to pay me for the work as fast as I did it; also I was to take two lots clear of encumbrance in part pay. He stated there was a small encumbrance on all the ground, which he

would remove. I can't tell the exact date of my quitting work. The value of my work, up to the time I stopped, for Gilbert, I can't tell. I stopped previous to the sale to Boughton & Moore. I resumed work shortly after the loan was made on this property by the insurance company. I supposed that I was at work for Boghton & Moore and was of the opinion that Gilbert was still interested in the buildings. The arrangement made with Boghton & Moore was this: The property
34 was advertised for sale by J. C. Eastwood as trustee to secure a noted of M. Eastwood of $11,000 and interest, which Mr. Gilbert had previously put on the ground, including my lots; at the public sale, to protect myself, I bought the property in; Messrs. Boughton & Moore called to see me in Mr. Eastwood's office in M. Eastwood's and Chas. Kennedy's presence, and persuaded me to let them have the property and not to take a deed; they would get the loan of $36,000 on the property, and pay off the amount due me at the time. I first refused to do it. Mr. Moore thought it hard that I should want to hold the property, and thought I ought to be satisfied with the amount coming to me. He promised that I should be paid from the loan $4,000 and a $3,000 note
35 unpaid at the time. After those were paid he and Bigelow, the agent of the loan, both stated that there would be, after paying those up, about $9,000 to be put on the work. They were to allow the difference in price of material.

They got the loan on the property and the work went on, and they paid on awhile and furnished some lumber. Boghton & Moore employed me to go on with the work on the houses. The contract was to be continued right along, and I was to be paid as the work went on. At the time I stopped work I had done more work than there was money, and was informed by the agent of the insurance company that no more money would be paid; that Boghton & Moore had drawn all the money, including the $4,000 due me. That is the reason I stopped work.

Up to the time I stopped work I was paid $2,000 by Boghton & Moore, and I suppose they paid the $3,000 note. I gave the note to
36 Martin, the brick-maker, and I don't know whether it has been paid by the company or by Boghton & Moore or not. The brick man told me that he had received his money on the note. I received by draft, Boghton & Moore, $1,000; by draft on Hubbard property, $1,000; lumber through Boghton & Moore, $2,000; this is $4,000 without the note; this was up to 11th of June, 1873.

I stopped working for Boghton & Moore previous to June 11th, 1873. I applied none of the money I got from Boghton & Moore to completing the Hubbard houses. There was some lumber too short for the Boghton & Moore houses that we used in the Hubbard houses. If it was so we replaced it. I mean we might have been short of lumber.

Redirect by Mr. EDMONSTON:

37 Int. You state that it was agreed by all parties that there was due you on these houses $4,000 at the time of the transaction had in Eastwood's office; did that include the note of $3,000, or was that note in addition?

Ans. The note was in addition.

Int. Was Gilbert present at that time?

Ans. I think not on that day; he was there a day or two before. I met him there about a day or so before.

Int. Is the money received by you since the deed to Boghton & Moore in excess of the value of the work done from that time to the 11th of June, 1873?

Ans. Leaving out the $3,000 note, it is not.

Int. Was there any understanding as to how the money paid to Boghton & Moore should be credited?

Ans. Nothing was said about that. The last money, I understood, that they paid was to go towards finishing up the houses or con-
38 tinuing the contract. That doesn't include the $3,000 or four thousand which I claimed at the time and they agreed to. That was to be drawn the first money from the loan.

Int. The last question is repeated.

Ans. The understanding was that I was to continue on the work of the contract and receive $1,000 every two weeks until $9,000 was paid on the contract, and they were to furnish other money to complete the contract outside of this loan. Two of this I got in money and two in lumber, as above stated.

W. G. PHILLIPS.

Sworn to and subscribed before me this 8th day of January, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

Adjourned to Jan'y 11th, '74, at 1 o'c'k p. m.

39 JAN'Y 11TH, '74.

Met pursuant to adjournment. Present, Mr. Edmonston and Mr. Totten.

Whereupon LLOYD P. PUMPHREY, a witness of lawful age, a resident of Washington City, produced, sworn and examined by and on the part of the complainant, deposes and says as follows, to wit:

I am acquainted with the complainant, Mr. Phillips. I have been working with him as his foreman since April, '71. I know the six houses built for Mr. Gilbert on I street, in square 675, near the corner of North Capitol street. I do not know them by the lots they are on. There are two houses on the corner, and then these six begin. I have worked on these houses from the beginning of them to the present day.

40 Int. Please state what had been done towards the completion of said houses up to the 11th day of June, 1873, giving as much in detail their condition as you can at that date.

Ans. All excavating was done except the coal vaults. The bay window foundation was all in for all of them. All the joist, all the frames excepting twelve bay-window frames. The tin roof was on; all the slating and flashing was finished. All brick work finished except the bay windows and coal vaults. All floors and partitions were up except about two of each. All the material for the stairway was out complete and up except two or three. The frames for the basement bay-windows were made, and one coat of paint on them. The foundations for the bay-windows were in and about one-third of the brick work
41 for that was done. All the back frames were primed. All material that was used on the Hubbard houses, which was very little, from the Boghton & Moore houses, was always exchanged by me in full; every piece I would use from one I would return. I would exchange material on my own responsibility. Whenever I was short of stuff in one place I would always replace it as soon as the other material came; but there was very little of that done. The houses were more then half finished on the 11th of June, when we stopped work.

Int. What was the condition of the brick front as to being painted and oiled prior to the 11th of June, 1873?

Ans. All finished from the garret down to the basement. All the look-outs for balconies, back and front, and cornices were in, and cornices sheathed and tinned.

42 Int. Do you remember what the condition of these buildings was in December, '72; or at the time a sale made by J. C. Eastwood, as trustee, when Mr. Phillips bid on and bought them in?

Ans. I know that all the joist were in except the ceiling joist; the tin roof wasn't finished; the slating wasn't finished; I don't think there was any floor laid. The brick work was in about the same condition. All the back brick work was done, but won't be positive about the front, although I believe it was. There were no carriages cut out or up for the stairs. There was a portion of the tin roof on, but it wasn't finished. There was no tin roof on the two large houses. I don't think there was but a portion of the roof sheathed in December. The

43 front was all open and there were no partitions in any of the six houses except the partitions in the main hall.

Int. Have you any knowledge or experience as to the value of the work; and, if so, can you state from that knowledge what was the value of the work done on said houses and materials used in the same up to December, '72?

Ans. I have had about eight years' experience in the business and can judge very near as to what they were worth at that time. I think about December, when the houses were sold, they were worth about $12,000, perhaps a little more; this is leaving out the lots, and I judge there was about $5,000 worth of work done and material used when we stopped in May or June, '73. I put the value of the houses at that time (June 11th, '73) at a little over $16,000.

44 Int. State whether there is any difference in the price of material and labor from the time of the sale in 1872 up to June 11th, '73, and the time prior to December, '72; and, if so, state at what time it was higher prior or since December, '72.

(Objected to by Mr. Totten.)

Ans. Material was higher prior to '72 than it was in June 11th, '73. Labor was higher from the time we commenced the houses to the present date, that is, carpenters' work; other labor I know nothing about. I am not a dealer in lumber and do not know as much about it as about labor. It might have been higher and it might have been lower; I can't state positively which. I have heard Mr. Gilbert put a value on these houses when finished several times. The smaller ones he

45 ranged from $14,000 to $15,000 when completed, and on one occasion he went as high as $16,000; and the two large houses he told me himself he had sold at $18,000 and had that bid standing for them.

Cross-examined by Mr. Totten:

I think the houses ought to bring $12,000 or $13,000 when finished.

L. P. PUMPHREY.

Sworn to and subscribed before me this 11th day of January, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

JAN'Y 11TH, '74.

S. H. Phillips, a witness of lawful age, a resident of Washington

City, produced, sworn, and examined by and on the part of the complainant, deposes and says as follows, to wit:

46 I know the six houses formerly owned by Mr. Gilbert on I street, in square No. 675. I have worked around that neighborhood in houses in that square. I am a boss plasterer. In June 11th, '73, these houses were nearly ready for me to go in and commence plastering. They were ready with the exception of one of them. I should think when I commenced work the buildings were more than half completed. When we commenced work there the houses were considered more than half done.

SAM'L H. PHILLIPS.

Sworn to and subscribed before me this 11th day of January, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

JAN'Y 20TH, '74.

Met pursuant to adjournment. Present, Messrs. Edmonston & Totten.

47 Whereupon CHARLES KENNEDY, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the complainant, deposes and says as follows, to wit:

I was the auctioneer at a sale on I street, near North Capitol street. I sold for Mr. J. C. Eastwood as trustee. The lots were bid off to Mr. Phillips, the complainant. I am acquainted with Messrs. Boghton & Moore. I was present at a conversation between Messrs. Boghton & Moore and Mr. Phillips. The purport seemed to be that the arrangement between them was satisfactory; the arrangement by which they were to have the houses seemed to be satisfactory to Mr. Phillips. They were to pay him whatever it was, and the details seemed to be understood between them. I can't say what the arrangement between them was.

Cross-examined by Mr. TOTTEN:

48 I can't tell the exact date of the conversation. It was some days after the sale. I can't tell the date of the sale. It was in October or November, 1872.

C. KENNEDY.

Sworn to and subscribed before me this 20th day of January, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

JAN'Y 20TH, '74.

J. C. EASTWOOD, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the complainant, deposes and says as follows, to wit:

I was trustee under a deed of trust given by B. F. Gilbert on the property mentioned in the bill. I offered the property for sale, and it was bid off to Mr. Phillips. Before he complied with the conditi-

49 tions of the sale, he and Boghton & Moore came in our office. They had an agreement between them to meet there together. They made an arrangement by which he was to give up his claim, and they were to settle with R. Eastwood and Phillips. There was an amount mentioned, but I couldn't name it. There was no dispute as to the amount; it seemed to be satisfactory. They made arrangements to get a loan from an insurance company, and give notes to my broker, who

held a deed of trust for a short time. I don't recollect how they were to pay Phillips, but they were to pay him after they got the loan through.

Cross-examined by Mr. TOTTEN:

This conversation took place af' the date of the sale. The sale took place, I think, about the latter part of November, 1872. East-
50 wood held the deed of trust from Gilbert. The claim that Boghton & Moore were to pay was a deed of trust note that Eastwood held from Gilbert, and Phillips' claim was for services and material furnished for the houses. I heard Boghton & Moore agree with Phillips to pay these claims.

J. C. EASTWOOD.

Sworn to and subscribed before me this 20th day of January, 1874.
T. D. ANDERSON,
Ex. in Ch'ry.

JANUARY 20TH, '74.

E. G. PUMPHREY, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the complainant, deposes and says as follows, to wit:

I am acquainted with both parties to this suit and J. G. Bige-
51 low. I know the property mentioned in this proceeding. I have been in Mr. Bigelow's office a number of times. I heard Mr Bigelow say, & Messrs. Bogton & Moore say, that as soon as Mr. Eastwood was paid off they would draw a draft to pay Mr. Phillips his bill or lien on the houses. I carried a draft drawn by Bigelow in favor of Mr. Phillips. This draft had to be countersigned by Messrs. Boghton & Moore. It was drawn by them on the insurance company. I was in with Mr. Phillips frequently, and he asked Mr. Bigelow to draw a draft for him, and Mr. Bigelow promised for about three or four weeks that he would draw a draft, and one day when we were in there Phillips asked him to draw a draft, and he said he would not do it until these Shylocks and thieves had paid the draft for $4,000 which he had drawn on
52 the insurance company for Messrs. Boghton & Moore, and which they had used for other purposes, and he said he didn't intend to pay them until they had made good the draft he had already drawn for them. Mr. Phillips did not sign that draft. The conversation about the $4,000 draft occurred after the $1,000 draft, or first draft spoken of, had been given. The $1,000 draft was to pay Mr. Phillips for work that he was then doing, and had no reference to the $4,000 draft.

Cross-examined by Mr. TOTTEN:

Mr. Phillips got this $1,000 draft. I gave it to him. He did not get the $4,000 draft. The conversation spoken of took place about February or March, 1873.

E. G. PUMPHREY.

Sworn to and subscribed before me this 20th day of January, 1874.
T. D. ANDERSON,
Ex. in Ch'ry.

53 JAN'Y 23D, '74.

Met by agreement of counsel. Present, Messrs. Edmonston and Tot'en.

Whereupon THOMAS W. SMITH, a witness of lawful age, a resident of

Washington City, produced, sworn, and examined by and for the complainant, deposes and says as follows, to wit:

I am a member of the firm of W. P. Cattrell & Co., lumber dealers. I am acquanted with the members of the firm of Boughton & Moore. Boughton & Moore bought $1,000 worth of lumber first, to be used in the furnishing of those six of the first eight houses on I street from North Capitol. Boghton & Moore bought the lumber to be delivered upon the order of Mr. Phillips to those houses.

Int. What was your understanding, from what took place between you and Boghton & Moore, upon what account or contract this
54 lumber was to be delivered; whether upon a contract by Phillips with Boghton & Moore to finish the houses?

Ans. From my conversations with them the lumber was to be furnished under their contract with him and in part payment. In their negotiation with us they stated to us that there was not money enough coming from the insurance companies to finish the houses. They wanted us to take a deed of trust for $1,000 on each house as payment for lumber. Said deed of trust to be given when the houses were so far advanced that they could raise money enough on them to take up Mr. Phillips' lien. I understood there was $6,000 deed of trust on each house held by the insurance companies.

THOS. W. SMITH.

55 Sworn to and subscribed before me this 23d day of January, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

FEB'Y 7TH, '74.

Met by agreement of counsel. Present, Messrs. Edmonston and Totten.

The witness PHILLIPS, the complainant, is recalled and says:

Previous to the time when Boughton & Moore took possession of the property there was over $12,000 worth of work done. The amount of credits was about $5,000, and the deed of trust of $3,000 was unpaid at the time; this was in addition to $5,000.

Cross-examined by Mr. TOTTEN:

Int. At what date did Boughton & Moore purchase this property?

Ans. I think about December, '72; the sale was in the latter part of November.

56 Int. At what date did you make the agreement with Boughton & Moore to go on with the work and finish the houses?

Ans. December 16th, '72, I think.

Int. Was there a written agreement between you?

Ans. I think not.

Int. By your agreement with Boughton & Moore, were you to finish the houses according to Gilbert's plans and specifications, or did you make changes in them?

Ans. My agreement with Boughton & Moore was to continue on the contract, to be allowed for the additional rise of material and to be paid $1,000 every two weeks. There were no changes about the tin roofing. In addition I was to be allowed the difference in the rise of material if there was any.

W. G. PHILLIPS.

57 Sworn to and subscribed before me this 7th day of February, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, T. D. Anderson, examiner in chancery, do hereby certify that in pursuance of agreement the foregoing depositions were taken down and by me reduced to writing in the presence of and from the statements of the witnesses at the time and place designated in the caption thereof, and were then and there by me read over to the witnesses, and by them subscribed in my presence, and in the presence of counsel for both parties, who were then and there attending, the witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

58 I farther certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. D. ANDERSON,
Ex. in Ch'ry.

59 *Testimony for Def'd'ts.*

In the supreme court of the District of Columbia.

PHILLIPS *vs.* GILBERT ET AL. } In equity. No. 3272 Doc.

For defendants.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses, begun and held on the 6th day of March, A. D. 1874, and continued from time to time by adjournment un' the 9th day of March, A. D. 1874, when the within depositions were taken, I, T. D. Anderson, an examiner in chancery, did cause to be personally present at Mr. Totten's office, 5th street, in the city of Washington, in said district, the within named witnesses, to testify on the part and behalf of the defendants in a certain cause now depending in the supreme court of the District of Columbia, wherein W. G. Phillips is the complainant, and B. F. Gilbert et al. are defendants.

T. D. ANDERSON,
Ex. in Ch'ry.

60 M'CH 6TH, '64.

Met pursuant to agreement of counsel to take testimony for the defendants. Present, Messrs. Edmonston and Totten.

Whereupon W. BOWEN MOORE, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the defendant, deposes and says as follows, to wit:

I am one of the defendants in this cause. I know the complainant, Mr. Phillips. Some time between the 16th and 30th of December, 1872, I made a contract with the complainant to complete six houses on the

lot mentioned in the bill. The terms of the agreement were that he was to finish the houses in the manner and on the terms made between him (the complainant) and B. F. Gilbert. It was specified that the difference between the cost of certain material at that time
61 and the cost when he made the first contract, if any, was to be bourne by us (Boughton & Moore). We were also to make some allowance, I believe, in regard to the plastering. We agreed to pay Phillips by drafts on the insurance companies that made the loan to us, as the work progressed, not to exceed $1,000 every two weeks.

At the time we purchased the houses Mr. Gilbert was owing us a large sum of money, and he offered us these houses subject to legal encumbrances, the margin to be credited on his account. We agreed to take the houses as they stood, provided he would substantiate the representations he made as to the encumbrances, and that Mr. Phillips would carry out his contract. In accordance with this agreement I went to Mr. Eastwood's office and there had an interview with
62 Mr. Phillips. [I there learned that Mr. Phillips had bid these houses in at a sale made under a deed of trust given to secure Mr. Eastwood, and that the terms of the sale had not been complied with; and there had been a dispute between Eastwood and Gilbert as to the validity of the sale, and that unless satisfactory terms were made Gilbert would make application to have the sale set aside. The failure to consummate the sale, as I understood from Eastwood, was on the part of Mr. Phillips, who had given a check which was not paid.]

(Part in brackets objected to by Mr. Edmonston.)

I also heard Phillips say that Eastwood's claim, under which the sale was made, was an unjust and usurious one. This was not the exact language but the substance of it, and that if the property were
63 to come into his possession he wouldn't pay it. This covers what Phillips said on the subject. On the other hand, Gilbert represented that Eastwood held his (Gilbert's) paper for a very large amount, and in any breach between him and Eastwood the latter had it in his power to ruin him, and he begged of me to make whatever arrangements we could to have the property transferred to us without suit or controversy. So, under the circumstances, we concluded it best to make such terms as would not compromise us in the future, and allow the houses to be completed and Mr. Gilbert's interest credited on his indebtedness to us; so under that agreement we were to pay Phillips all that was justly due him. This was the general agreement.

The first conversation I had was with Eastwood and Gilbert.
64 I then agreed with Mr. Phillips to take the property, and take his contract as it stood between him and Gilbert, and pay him what was justly due him. Mr. Phillips consented to this. I mean by "what was justly due him," was for what was justly due him from Gilbert for work done on the houses prior to this time. On this bargain Mr. Phillips went to work on the houses. I made this bargain for Boughton & Moore. It was on or about the 27th of December, 1872.

Mr. Phillips did not go to work immediately, because of some delay in completing the loan from the insurance companies. We made a loan from the Connecticut General Life Insurance Company for $6,000 on each house. The money arising from this loan was to be disbursed by the agent of this company, first to pay off the existing encum-
65 brances, and then towards the completion of the houses. [This claim for a lien of Phillips was not considered one of the encumbrances either by the agent of the company, Mr. Gilbert, or ourselves.]

(Part in brackets objected to by Mr. Edmonston.)

Int. Why not?

(Objected to by Mr. Edmonston.)

Ans. In the first place, because Gilbert represented to the insurance company and ourselves that he had paid Phillips in full for work done when we took the houses, excepting a sum for which he had given Phillips a deed of trust, which deed of trust we understood was the amount due Mr. Phillips, and which we, through the agent of the insurance company, subsequently paid. In the next place, we were informed by the agent of the company, during the negotiation for the loan,
66 that his lien had been filed against the entire row of buildings, consisting of twelve or more, and that it had been released from time to time on other houses, and that it should not stand in the way of the loan we were negotiating, and after the loan was consummated the agent represented that the lien had been raised or released, and the release was in the hands of the company.

About this time, Mr. Phillips came to our office, 932 F st., and there met my partner, Mr. Boughton, and myself, and we talked this matter over. General Boughton approved of what I had done. From that time out, except general conversations, we executed no further details with Mr. Phillips. All details were transacted between Mr. Bigelow and Mr. Phillips.

In this bargain we agreed to pay Phillips whatever was justly
67 due for the work done by Phillips for Gilbert. He accepted this proposition and went to work on it.

W. BOWEN MOORE.

Sworn to and subscribed before me this 6th day of March, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

M'CH 6TH, '74.

JONATHAN G. BIGELOW, a witness of lawful age, a resident of Washington City, produced, sworn and examined by and for the defendant, deposes and says as follows, to wit:

I know the parties to this suit. I was an agent for the Connecticut General Life Insurance Company December, 1872. I attended to the negotiation of a loan from our company to Boughton & Moore after that time. The loan in question was to be located on lots 263, 264,
68 265, 266, 267, & 268, according to Horace Boughton's subdivision of certain lots in square 675. Previous to this subdivision these identical lots were known as 123, 124, 125, 126, 127, 128, and all of 129, not deeded to W. G. Phillips by B. F. Gilbert, according to Gilbert's subdivision of square 675. The first talk with me, looking to a loan on these lots and improvements thereon, was with Wm. G. Phillips. I expressed the opinion that I could negotiate a loan of $36,000 with the Connecticut General Life Insurance Company.

Mr. Phillips accordingly got the abstract of the said lots from Mr. Ward, which showed among other things a lien filed by himself of $27,000. I understood from Phillips and others that previously he (Phillips) had bought the lots and houses at public auction, and
69 the loan was to have been made for and in behalf Mr. Phillips, in which case the lien of $27,000 constituted no longer a claim upon the property; accordingly Phillips wrote a release of that lien signed by himself, which, together with the abstract, I took to Hartford, Connecticut, and presented the same to the president of the Connecticut General Life Insurance Company.

The loan was accepted conditionally; by which I mean to say that the company could make no advances on it until after the first of February, 1873. What became of the release I do not know, or what became of the abstract I did not know for nearly a year after; it may be possible that I returned the release of the lien to Mr. Phillips, but I have no recollection of it. I remember distinctly of having such
70 release at Hartford, because in looking over the abstract with the president of the company, a special remark was made about the size of the encumbrance, $27,000, when I called his attention to the fact that I had in my hand a release of the lien.

In the meantime, that is, before the 1st of February, 1873, Mr. Phillips, by some arrangement, the details of which I do not understand, sold the houses and lots to Boughton & Moore. I did not understand, however, whether the lien was released; but I understood that Boughton & Moore were to pay Phillips the just claim he had upon said property for material furnished and labor under the contract with B. F. Gilbert.

The release was delivered to me by Phillips to show that the lien was released. It is my impression, and always has been, that I left
71 the release and the abstract with the president of the company. The company made the loan on the faith of the release of the lien. I supposed that Phillips was going to get the loan in his (Phillips') name. When the transfer of the property was made to Boughton & Moore, I understood the loan was to be perfected for Boughton & Moore.

One of the notes drawn to the order of Phillips for $3,000 and interest was lifted and $14,373 paid to Eastwood, and $4,500 paid to Burnstine. I can't tell how much money was paid to Phillips without looking at my check-books and drafts. There were two drafts advanced of $1,000 each; one went to the credit of Mr. Phillips, I think.

Adjourned to M'ch 7th, '74, at 12 m.

ANDERSON, *Ex.*

72 M'CH 7TH, '74.

Met pursuant to adjournment. Present, Messrs. Edmonston and Totten.

The examination of the witness BIGELOW is here resumed.

By Mr. TOTTEN:

Q. Mr. Bigelow, state, if you please, how much money you paid out of this general insurance company's loan to Mr. Phillips, and how much you paid out altogether prior to the filing of this bill?

A. The filing of the bill was June 11th. Well, I paid four thousand dollars.

Q. To whom?

A. William G. Phillips.

Q. I wish you would go on and give the dates when you paid, and how you paid.

A. Two thousand dollars in lumber and two thousand dollars in drafts. I cannot give the date of the drafts for the reason that
73 the only record I had of them was contained in the stubs of the drafts, which were stolen from my office, and I do not know who stole them.

Q. Is that the entire sum that you paid to Phillips of the entire loan?

A. I paid two thousand dollars besides, since the 11th of June.

Q. How did you pay that?

A. One thousand dollars by draft and one thousand dollars in money.

Q. Can you give the dates of these two payments?

A. It was in August and September. The first one hundred dollars was August 25th, 1873; and September 6th, 1873, nine hundred dollars. A draft, subsequently, for one thousand dollars. I cannot give the date of it. I don't think that had anything to do with this subject. The payments made after June were made under the new arrangement.

74 Q. Now, Mr. Bigelow, state what that arrangement was.

A. The arrangement was a new contract.

Q. Well, by whom and with whom?

A. It was for the completion of the houses for the sum of fifteen thousand nine hundred dollars. with exception of the steps and fencing.

Q. I want to know who made the contract.

A. The contract was made with me.

Q. Who were you acting for?

A. I was acting for the parties here.

Q. Who?

A. For the parties here, everybody interested.

Q. Well, I want to know who were.

A. Boughton & Moore executed new trusts on the property on which I was expecting to get money from the company. Subsequently these trusts were surrendered, and similar trusts were executed upon

75 four of the houses to secure the company. Mr. Phillips has, I suppose, completed these four houses under the contract. The houses are completed, I believe.

Q. Now state who that bargain was with.

A. Boughton & Moore.

Q. And was it with Phillips; was Phillips to go on and finish the houses under that?

A. Yes, sir.

Q. And all the money that you paid to Mr. Phillips was four thousand dollars?

A. Four thousand dollars.

Q. And all of that money came out of the loan of the Life Insurance Company of Boughton & Moore?

A. Yes, sir.

Q. You said yesterday that it was possible that you gave the release of mechanics' lien, that was executed by Phillips, back to him?

76 A. I said I had no remembrance of it, of returning the lease to Mr. Phillips, because I was always under the impression that I left the abstract and the release of the lien with the president of the company, at Hartford, Connecticut, and I have no knowledge of how the abstract found its way back to Washington. The release, I do not know positively what became of it.

Q. Did you not give that release and mechanics' lien made by Phillips to Boughton & Moore?

A. I do not know how that abstract came in the possession of Boughton & Moore. There has been a great controversy about this abstract, and the president of the company has searched for it among his papers many times, according to his statement, and I have searched many times for it myself without being able to find it.

77 Cross examination by Mr. :

Q. In your last answer you said that four thousand dollars was paid to Phillips from the loan made by the insurance company to

Boughton & Moore. You do not mean by that to alter your previous answer that two thousand was paid in lumber and two thousand in cash?

A. Two thousand dollars in lumber and two thousand in cash, that is what I meant.

Q. State when you went to Hartford on behalf of Mr. Phillips to get a loan for him.

A. I think it was in December, 1872, or Jan., 1873.

Q. When the new arrangement was made with Boughton & Moore did you go on to Hartford in regard to this loan that was made to them, to Boughton & Moore?

78 A. It is my impression that I did not go to Hartford for Boughton & Moore.

Q. You have said that the release of this lien was given by Mr. Phillips to you when you went on to see about the loan to him, Phillips, about this property?

A. To me, yes, sir.

Q. I will ask was it not given to be used only in case the loan was made to him, Phillips?

A. And I have before stated that I had no idea at the time I presented the abstract and made application for the loan that it was for any other person than Mr. Phillips.

Q. It was made known to the company that he was the purchaser?

A. I made known to the company that William G. Phillips was the purchaser of the property, and the then present owner of the property, although the abstract showed the title in B. F. Gilbert. And I

79 called attention to the fact that the lien was filed by Mr. Phillips, the owner.

Q. Called attention to what?

A. That the lien was filed by the owner. The lien was so large of record that it precluded at once all possibility of making a loan of thirty-six thousand dollars on the property, because it would have required over forty thousand dollars to raise the prior encumbrances. Hence it was made to appear that the lien was not really an encumbrance upon the property.

Q. Did you not understand from Mr. Phillips at this time that the amount due to him for work already done was nearly about the sum of four thousand dollars, and did not you make known that fact to the insurance company?

A. Mr. Phillips represented that there was about seven thou-

80 sand dollars embraced in the lien, as near as I can remember. I represented to the company that it was immaterial whether there was any claim by virtue of this lien or not, because I held in my hand a release of it, which I showed to the president. Now this was when Phillips owned the property, as I supposed. I do not remember ever going to Hartford in regard to this matter after Boughton & Moore became owners of the property.

Q. Did he not object and represent that he had a note of three thousand covering a portion of the seven thousand?

A. I subsequently learned that that was embraced in the seven thousand. I learned that subsequently, after the loan had been negotiated.

81 Q. When the property was transferred to Boughton & Moore, and before the loan was made to them, did you not communicate with the company in reference to the loan?

A. I did. I saw the president in regard to that at Hartford, but did

not go there for that purpose. I incidentally mentioned the fact of the transfer to Boughton & Moore.

Q. The money coming from this loan was to be disbursed by you, or through you, was it not?

A. Not necessarily.

Q. What was the fact as to its disbursement?

A. Some of it was disbursed through me, and some of it was not. A very small portion of the loan was disbursed through me, and disbursements were made directly by the company.

Q. The company did not advance all this money to Boughton & Moore at the time the loan was made?

82 A. No, sir.

Q. Were not encumbrances paid by the company, or by you, its agent?

A. Paid by the company.

Q. Was it not understood by you and by Boughton & Moore that the money due to Mr. Phillips on account of the lien should be paid out of this loan to Boughton & Moore?

A. Yes, sir; all that was due Mr. Phillips was to have been paid out of the loan. I never understood anything to the contrary.

Q. Now, please state how this money was drawn with which these encumbrances were paid.

A. They were drawn on drafts to the order of Boughton & Moore; drawn on the company by me, and Boughton & Moore would endorse the draft that would go to the parties holding the encumbrances, so that all disbursement, in the main, was made directly by the company.

83 Q. Who got the drafts immediately after they were endorsed by Boughton & Moore?

A. Ordinarily a draft, after being endorsed by Boughton & Moore, would be given to the party to whom the disbursement was to have been made. I might have given drafts to the party to whom the agreement was to have been made and let him get Boughton & Moore to endorse it. I do not know the particular action in the particular case.

Q. Did Mr. Phillips make application to you to be paid the amount which he claimed on account of the lien from this loan of Boughton & Moore?

A. He and I have had conversations touching this subject of indebtedness on account of the lien, as I understand it; on account of transactions had between Mr. Phillips and Mr. Gilbert. Mr. Phillips, on the one hand, claims four thousand dollars due, or thereabouts, inde-

84 pendent of the three thousand dollar note before mentioned; while, on the other hand, Mr. Gilbert claims that there was no such indebtedness in existence. But of this I had nothing to do; the parties who directed me in the premises were Boughton & Moore. I could not make any payment without their knowledge and consent. I was simply an agent, and in every case where payments were made on account of prior encumbrances the amount that was paid was submitted to and approved by Boughton & Moore. I will state further that Boughton & Moore have never acknowledged to me an indebtedness on account of the lien for four thousand dollars, or any other indebtedness, nor have they ever authorized me to make drafts for that

85 amount in behalf of Mr. Phillips. I have no personal knowledge of the lien, or of its character.

Q. Did you not state to Mr. Phillips, when he made application to you for this money, that Boughton & Moore had drawn it themselves,

and with the understanding that as soon as they got a loan on some property in the first ward that they were to return this four thousand dollars and have it applied to the payment of Mr. Phillips' lien, or what Mr. Phillips claims under his lien; this conversation taking place in your office, and in the presence of E. G. Pumphrey and others, some time in March probably, or in that neighborhood, or some time since?

A. The question as to the amount of the lien due Mr. Phillips has never been settled in my mind. I never knew the amount, only what he claimed; it was understood, however, in the beginning, that
86 whatever was due him, if anything, that he should be paid out of this loan. Some time in July, I think, or August, 1873, Mr. Phillips, Mr. Phumphrey, and others were in my office, when the subject came up, and I may and probably did state the gentlemen, Boughton & Moore, had received four thousand dollars, in two drafts of two thousand dollars each, that ought to have been expended towards the completion of those houses, but that the amount would be, I was assured, made good by the gentlemen, Boughton & Moore, from a loan they were expecting from other sources. Whether it has or not I am not able to say.

Q. When did you first know this release of lien was lost?

A. I first knew of that being lost—I think it was Mr. Moore who called my attention to it, and I said to him I thought I had it, and I searched for it but did not find it.

87 Q. When was that?

A. It was since June last summer. The abstract and lien I supposed were together, until last fall some time I saw a release in my safe, and, casually glancing over it, I thought it was, at the time, the release of the lien on the property in question. But upon re-examination I found it to be a release of the lien filed by Mr. Phillips on other property in the same square. So the lien in question or the release of it has not been seen by me to my knowledge since I was in Hartford, and I had always supposed it was with the abstract.

Q. The release of lien found in your office was for what property, or was it for the property of which the loan was made?

A. Yes, sir; it was a release of lien on the Hubbard houses.

88 Q. Did Boughton & Moore tell you when they first knew that the release of the lien on the property in question was missing?

A. No, sir; they never did.

Q. Did you go to Mr. Phillips to get him to release this lien, after the money was paid to Mr. Eastwood?

A. I don't remember that I ever did.

Q. Do you remember preparing a release of the lien on the property in question and taking it to Mr. Phillips to get him to execute in April, 1873?

A. No, sir.

Q. I show you a paper now, marked J. G. B., and ask you if it is in your handwriting?

A. Yes, sir; that is my handwriting.

Q. Do you remember now giving that to Mr. Phillips?

A. No; I have no knowledge of it.

Q. Do you remember saying to Mr. Phillips, on G street, a short
89 time after the payment of Mr. Eastwood's debt, that if he would execute a release of his lien so that the company could come to the bottom upon these houses, that he would be shortly paid, and give to him at the time the paper marked J. G. B.?

A. I do not remember anything about the paper, and the only thing

that I can see that would prompt me to get a paper of that kind executed would be for the company to get the first lien of the record. I cannot conceive now any other object.

(Paper marked J. G. B. is produced by the complainant and filed as an exhibit.)

Q. Might not this conversation have occurred?

A. It might have occurred I have no knowledge whatever of that paper now. I have no remembrance of it. I recognize it as my
90 handwriting, but, as I have before stated, I can see no other object I could have had in view, except it had been for the purpose of getting the company the first lien.

Redirect examination by Mr. TOTTEN:

Q. Look at the paper attached to the answer of the Connecticut General Life Insurance Company, marked copy of the discharge of lien, and state whether it is a copy of the discharge of the lien signed by Mr. Phillips and given by you to the insurance company at the time of this loan.

(Objected to.)

Paper attached to the answer of the Connecticut General Life Insurance Company here shown to witness.

A. My remembrance of that release of lien is all that I have to go by. That release was couched, to the best of my knowledge and belief, in language substantially the same as used here. I would not say
91 that it was the exact language. The purport and effect was identical with this purported copy.

Q. Was that about the date of the release delivered by Mr. Phillips to the company?

A. The release delivered by Mr. Phillips to me in person was either in the month of December, 1872, or the first of January; probably it was from the first to the middle of January, 1873.

Q. Was it the agreement between Mr. Phillips and Boughton & Moore and you that the loan as negotiated by Mr. Phillips from the company should be turned over just as it was to Boughton & Moore?

A. That was my understanding of it.

Q. In what time did Mr. Phillips agree to finish up the houses for Boughton & Moore?

(Object' to.)

A. I would not like to say that he agreed to finish them at all.
92 Subsequent to the first conversation had with Mr. Phillips upon the subject, he called at my office and said that he would not finish up the houses; that he would only do work upon them to the extent of the money advanced, which was so ambiguous with me that I did not think it worth while to enter into any specific contract, inasmuch as he might have claimed to have done several thousand dollars' worth of work, while in point of fact he would not have done more than several hundred dollars' worth.

Q. Was there any agreement by Mr. Phillips as to the time within which he was to complete the work for the money advanced to him to pay for the same?

(Objected to.)

A. Yes, sir; but he backed out of it. He agreed, in the first place, to complete the work in ninety days, I think, provided he would
93 have a thousand dollars every two weeks.

Q. Did he get his pay according to agreement?

(Objected to.)

A. He did, so far as the agreement was carried out.

Recross-examination by Mr. :

Q. Is the discharge of lien annexed to the answer of the Connecticut Life-Insurance Company in your handwriting?

A. No, sir.

Q. You speak only from memory as to the language of the release?

A. It was a short, comprehensive release, authorizing the clerk of the court to record it as such.

(Excepted to by the complainant as not responsive to the question; repeated.)

A. I speak only from memory as to the precise language of the release, as I kept no copy at the time; but I am confident it was sufficient to have released the lien.

94 Q. Did you not state to Mr. Phillips that you could, if you chose, have released his lien at any time, but that you had a release of his which you got from him when he was to get his loan?

A. The release that I sup'osed was on this property turned out to be a release upon other property; and at the time I had such conversation with him it was an established fact that there was a dispute between him and Boughton & Moore as to his claim under the lien.

Q. If, as you say, Mr. Phillips gave you a release of this lien, was it not given with dictinct understanding that it was to be used only in case a loan was made to him?

A. There was no such understanding, and could not have been, from the fact that the question as to whether any one could have been
95 interested in loan as the principal was not for a moment entertained, besides himself.

Q. Did you not know that in December negotiations were pending between Mr. Phillips and Boughton & Moore in regard to the transfer of this property to Boughton & Moore by Mr. Gilbert, and that Mr. Phillips released any claim that he had under the sale made to him by Mr. Eastwood?

A. I first learned of such negotiations after my return from Hartford. I do not think I ever heard such negotiations spoken of, if there were any, until after my return. But I will further state that Mr. Phillips advanced to Mr. Ward fifty dollars towards payment for this abstract upon the strength of what he told me himself in the acknowledgement of Mr. Robert H. Ward. I did not see him pay it.

Q. Did you not go to Hartford in regard to this loan to Mr.
96 Phillips in November, 1873, and did you not from Hartford telegraph to Mr. Phillips in regard to it?

A. I would not be certain. I think it was in December or January—I don't know what time the sale took place—but it was considerable time afterwards.

The complainant here shows paper marked Exhibit J. G. B., No. 1, and asks the witness if he remembers sending a telegram of the purport of the paper.

A. I do not think I had the abstract at this time with me. I remember sending a telegram. I went to Boston at that time, and to Lowell, Mass., absent about ten days. But upon this matter I afterwards returned to Hartford. I do not think at this time I had the abstract with me, but possibly may have had it. This time that I was in Hart-
97 ford, it being after the Boston fire, I did not go on any particular business in connection with loans, but went to Boston and to Lowell, Mass., and was absent some ten days or two weeks from the city. That is my recollection of that now.

Redirect examination by Mr. TOTTEN:

Q. You spoke a few minutes ago of conversation between you and Mr. Phillips about this release or some release; how long ago did that conversation take place?

A. Subsequent to the commencement of these proceedings. I think three or four months ago. I then supposed that I had the release in dispute in my safe; that it had actually come to life, but upon re-examination I found it to be the release of other property.

Q. Upon what day was the loan from the insurance company to Boughton & Moore consummated?

98 A. Feb. 1st, 1873.

Q. For what purpose was the form of release of Phillips' mechanics' lien, shown to you at the last meeting, drawn out by you? I mean the paper marked J. G. B.

Ans. Since the adjournment of the last meeting I have tried to refresh my memory, and for that purpose have consulted certain papers. It now occurs to me that this release was written with the view of reducing the encumbrance on three houses to that only held by the company, namely, $6,000 to a house and lot, the object being to raise $3,000 in lumber by giving three second deeds of trust upon the property. The lumber was to be had of W. P. Cottrell.

Int. Wasn't the object of this to save time in sending to Hartford for this other release?

(Objected to by Mr. Edmonston.)

99 Ans. I have before stated that I was always aware of the fact that there was of record a lien of $27,000, and at the time in question (April 28th, 1873) it was known to me and the president of the company, Edward W. Parson, that the abstract and release of lien before mentioned were missing, and this release was written out for the purpose before mentioned and because of the loss of the other. I do not mean to say, however, that if I had had the original I would have put it on record without first having consulted Mr. Phillips, because of a dispute about the amount due him.

Cross-examined by Mr. EDMONSTON:

Int. The $4,000 paid to Mr. Phillips, partly in money and partly in lumber, was on account of the work done after the loan to Boughton & Moore, was it not?

Ans. It was.

JONATHAN G. BIGELOW.

100 Sworn to and subscribed before me this 12th day of March, 1874.

T. D. ANDERSON, *Ex. in Ch'ry.*

Adjourned to M'ch 9th, '74.

ANDERSON, *Ex.*

EXHIBIT J. G. P.

WASHINGTON, D. C., *April 28th*, 1873.

To the clerk circuit court, D. C.:

SIR: You are hereby authorized to enter of record the following lots as released from the lien filed by me the 23d day of May, A. D. 1872, viz: lots 123, 124, 125, and the east eight feet of lot 126, in B. F. Gilbert's recorded subdivision of square # 675.

101 EXHIBIT J. G. B., No. 1.

(By telegraph from Hartford.)

FRANKLIN TELEGRAPH CO.,
Nov. 19, 1872.

To W. G. PHILLIPS,
Care of J. G. Bigelow, 628 F st.:

Boston fire prevents loans till February; all right then; arrange accordingly.

J. G. BIGELOW.

11 pd., 53.

This message has just been received at the office, 515 Seventh st.

MARCH 9TH, '74.

Met pursuant to adjournment. Present, Messrs. Edmonston and Totten.

Whereupon GEORGE B. COBURN, a witness of lawful age, a resident of Washington City, produced, sworn, and examined by and for the defendant, deposes and says as follows, to wit:

102 Int. Do you know anything about the price agreed upon between Gilbert and Phillips for the lot Phillips was to take in part payment for his labor and materials in the houses in question?

Ans. All I know is from hearsay. I didn't hear the final agreement.

Int. What was said to Phillips, or what did Phillips say about it?

The price mentioned by Gilbert to him, as near as I can remember, was one dollar per foot for the corner lot, and 75 cents for the other.

Int. Was this mentioned to Phillips?

Ans. I think so.

Did Phillips assent to the price?

Ans. I can't say that he did.

GEO. B. COBURN.

103 MARCH 9TH, '74.

B. F. GILBERT:

I know the parties to this suit. I am one of the defendants.

Int. At what price per square foot was Phillips to take the ground in part payment of the labor and material in the houses in question?

Ans. The corner lot was $1 per square foot. The adjoining lots were 75 cents per square foot. I was to have a dollar a foot for the ground the corner house covered, and 75 cents per square foot for the ground covered by the next house. The front of the corner house was 23 feet and 4 inches, embracing all of lot 131 and part of lot 130 in square 675. The depth of both lots was 80 feet. After this agreement Mr.

104 Phillips came to me with a deed prepared, wishing me to let him have all the lots at 75 cents per foot. I told him I much preferred to keep them than letting him have them at that price. If my memory serves me, I executed that deed with the understanding that I was selling the corner lot at a $1 per foot. This was to save a new deed being drawn.

Int. Do you know anything about Phillips having executed and delivered a release of the lien claimed by him on these lots for the purpose of getting a loan from the Connecticut Life Insurance Company? and if you do, state it.

Ans. I understood so from Boughton & Moore. I only know from

hearsay. Also from Mr. Day, one of the trustees of the company, who states that Phillips said he considered the lien released.

(The answer objected to by Mr. Edmonston.)

105 Int. At the time Boughton & Moore took this property how was justly due from you to Phillips for work and material on the houses in question?

Ans. I do not consider anything was due him.

Int. Had he been paid by you for such work and material?

Ans. He had been paid in property, notes, and money about $10,000; there had not that amount of work been done on the buildings to my knowledge. Besides, he had forfeited his agreement in not pressing on the work according to agreement. He promised me faithfully to go right to work on them from time to time, in case I would get his two houses released from the encumbrance that was then on them. After getting the releases he never d'd a dollar's worth of work on the buildings for me.

106 Int. Did Phillips agree to take Boughton & Moore for pay for this work?

Ans. I know nothing about it.

What was the amount of damages to you caused by Phillips' failure to carry on the work in good faith according to contract?

(Objected to by Mr. Edmonston.)

Ans. The damages were incalculable, from his failure to carry on the work and filing a bogus lien of $27,000 against me when I did not owe him a dollar; this was at a time when it greatly injured my credit. I was paying 5 per cent. a month for a large amount of money, and these houses stood for nearly a year but two stories high. Had they been put under roof, as he agreed, and at the time he agreed, I would have been able to obtain money at a much less rate of interest.

107 Int. What have you to say as to the fairness of the sale instigated by Eastwood where Phillips was the purchaser?

(Objected to by Mr. Edmonston.)

Ans. I then believed it to be a collusion between the parties, and I do now. The deed of trust under which the property was advertised was composed of interest at the rate of 5 & 10 per cent. a month on other indebtedness to Mr. M. Eastwood. I went to Eastwood's office a few hours before the sale, and made an agreement with him to bid the property in myself; he to take my check for the cash payment on the ground, it being then too late to raise the money. The check was then drawn in the presence of the three parties. I asked Kennedy, the auctioneer, to take my check and bid the property in to save

108 my going to the ground. They decided I had better attend the sale and bid myself. I did so, bidding on the property against Phillips to about $23,000, it being struck off to me. They then refused to receive my check, according to the agreement, and during the talk thereafter there came up a terrible storm of wind and rain which threatened to blow the buildings down. Mr. Edmonston, the complainant's attorney, and myself sought shelter under the porch of a house in the neighborhood. During this storm, they pretended to sell this property to Mr. Phillips for about $16,000, some $7,000 less than his previous bid.

Int. Did you threaten to institute legal proceedings to set aside this sale, unless some arrangement was made?

109 Ans. I did at the time, and [a day or two afterwards Eastwood stated to me that the check Phillips gave as payment that night was not paid.]

(Part in brackets objected to by Mr. Edmonston.)

And that I could have the property by making arrangements with Boughton & Moore, which I did.

Cross-examined by Mr. EDMONSTON:

Int. You executed a deed of this property to Boughton & Moore a short time after the sale of Eastwood's; and, if so, state the consideration named in the deed.

Ans. The consideration named in the deed I do not recollect. I know it (the actual consideration) was a great sacrifice.

Int. Do you know the size of the lots on which these six houses were built?

110 Ans. The lots the houses stand on are 21 feet by 80.

Int. Please state at what price Mr. Phillips was to erect these six houses, according to his contract with you.

Ans. The aggregate value was a fraction over $32,000. [These houses were to have stone steps and walnut doors on the first floor.]

(Answer objected to by Mr. Edmonston as not responsive.)

The price was not to be $32,000 as the houses are now being finished.

Int. You have stated that the lots covered by the corner house and the one next to it were sold at the prices named by you; was that to be clear of encumbrances?

Ans. It was the price, clear of encumbrances. I afterwards cleared off the encumbrances, except taxes.

Int. The houses were under way, or partially constructed, when you gave the deed to Phillips, were they not?

111 Ans. They were. They were two stories high.

Int. Was the deed of trust from which you released the lots the same trust under which Eastwood made sale of the six houses referred to by you in your testimony?

Ans. That one and one other.

Int. Was this deed of trust given before the lien of Phillips was filed?

Ans. It was given before the lien was filed, or any bricks laid under the contract.

Int. Had not the foundation been dug, or partially dug?

Ans. They may have been commenced.

Int. Had not Burnstine a trust prior to that of Eastwood's?

Ans. There was a trust of $4,500, on which there had been $2,300 advanced.

Int. You state that Mr. Phillips had been paid about $10,000

112 up to the time of the sale by Eastwood in property, notes, and money; please set out in detail, and minutely, what property was conveyed, what notes were given, and what money paid.

Ans. The lots conveyed amounted to $3,120, being the two lots mentioned in my direct testimony. According to the price per foot in my testimony, a $3,000 deed of trust note, and the most of the balance in cash, the exact amount of which I cannot state, there being some material and a small amount of life insurance.

Int. Do you speak now from recollection simply, as to the amount of money and material?

Ans. I do; as I have no written memoranda with me.

Int. Have you any written memoranda of the moneys paid to Mr. Phillips on account of this work? If you have, where are they, and by whom were such memoranda made?

113 Ans. Up to a certain date my books show charges of moneys paid which were made by my clerk; all memoranda were furnished

by me. My books are not posted to the date of my last payments. My memoranda of these amounts are among my papers.

The complainant's counsel here gives notice to produce all written memoranda in reference to payments made to Phillips on account of this work.

Int. Do you remember how much Phillips bid on the property offered for sale by Eastwood prior to your bid of about $23,000?

Ans. His was the last bid before mine; his being a very small amount less than mine.

Redirect by Mr. Totten:

Int. How will your interests be affected by the result of this suit?

(Objected to by Mr. Edmonston.)

114 Ans. I have no idea it will affect me in any way.

Int. Is it possible for you to be affected in any way?

Ans. Not to my knowledge.

B. F. GILBERT.

Sworn to and subscribed before me this 9th day of M'ch, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, T. D. Anderson, examiner in chancery, do hereby certify that in pursuance of agreement the foregoing depositions were taken down and by me reduced to writing in the presence of and from the statement of witnesses at the time and place designated in the caption thereof,

115 and were then and there by me read over to the witnesses and by them subscribed in my presence and in the presence of counsel for both parties, who were then and there attending, the witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. D. ANDERSON,
Ex. in Ch'ry.

116 *Rebutting testimony comp'ts.*

In the supreme court of the District of Columbia.

PHILLIPS *vs.* GILBERT ET AL. } In equity. No. 3272. Doc.

For complainant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination begun and held on the 10th day of March, A. D. 1874, when the within depositions were taken, I, T. D. Anderson, an examiner in chancery, did cause to be personally present at the office of Enoch Totten, esq., in the city of Washington, in said District, the within-named witnesses, to testify on the part and be-

half of the complainant in a certain cause now depending in the supreme court of the District of Corumbia, wherein W. G. Phillips is complainant and B. F. Gilbert et al. are defendants.

T. D. ANDERSON,
Ex. in Ch'ry.

117 MARCH 10TH, 1874.

Met to take testimony in rebuttal for the complainant. Present, Messrs. Edmonston and Totten.

The complainant, PHILLIPS, is here recalled, and says:

Looking at the deed, marked Ex. T. D. A., it is the deed given by Gilbert for the lot on which the corner house stands, and is the lot which the defendant Gilbert has testified was to be taken at $1 per foot.

Int. State whether or not, after having heard the testimony of Gilbert, that the facts as to the price to be paid for that lot was as stated in your examination-in-chief, to wit, 75 cents per square foot.

Ans. It was. He first suggested that the corner lot was worth $1 per foot, but if the two lots were taken I could have them for 75 cents. His clerk figured out the number of feet and made the deeds.

118 Int. State whether you kept an account of all moneys paid to you by Gilbert or on his account, and whether you can give the dates when the payments were made.

Ans. I did keep such an account. I can give the dates referred to.

Int. On page 4 of your direct examination you have given a statement of all moneys received from Gilbert. Can you still say that that is a correct statement?

Ans. That is all right.

Int. State whether you ever gave to J. G. Bigelow a release of lien; and, if so, state the circumstances under which it was given, and for what purpose.

Ans. I think I gave him such release. When he was about to start for Hartford with the abstract he suggested to me it would be
119 necessary to have a release of lien to place in the hands of the company to give them authority to release the lien before the loan could be made to me. That was to be used only if the loan was made to me, and returned in the event of my not getting the loan, and to remain on the property until my claim was satisfied.

Int. Under the contract with Gilbert, were you to furnish stone steps for the houses and walnut doors?

Ans. There were no stone steps or walnut doors to be used on the houses. The porches were to be made heavy wood porches, heavy rails and large posts, and to be painted and sanded in imitation of stone. I think Gilbert said once that he thought he would pay the difference and put up stone steps, but that I had nothing to do with. There were no walnut doors to be put in the houses. They were to be pine, and painted and grained in imitation of walnut.

120 Cross examined by Mr. TOTTEN:

Int. To whom did you give this release of your lien?

Ans. To Bigelow.

Int. Has it ever been returned to you?

Ans. It has not.

Int. Do you know where it is?

Ans. I do not. He (Bigelow) has told me he has had it.

Int. Did you pay off an encumbrance on your house of about $1,000 out of money paid to you out of this loan from the insurance company?

Ans. I did not. I paid it on no house.

Int. How much money did you make out of the transaction with Gilbert and Boughton & Moore about these houses?

The question is withdrawn.

W. G. PHILLIPS.

Sworn to and subscribed before me this 10th day of March, 1874.

T. D. ANDERSON,
Ex. in Ch'ry.

The deed marked Ex. T. D. A. is here filed.

121 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, T. D. Anderson, examiner in chancery, do hereby certify that in pursuance of agreement the foregoing deposition was taken down and by me reduced to writing in presence of and from the statement of the witness at the time and place designated in the caption thereof, and was then and there by me read over to the witness, and by him subscribed in my presence and in the presence of counsel for both parties, who were then and there attending, the witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. D. ANDERSON,
Ex. in Ch'ry.

122 EXHIBIT T. D. A.

[$1.50 int. rev. stamps.]

This indenture, made this twenty-second day of December, in the year of our Lord one thousand eight hundred and seventy-one, between Benjamin F. Gilbert and Almyra J. Gilbert, his wife, of the city of Washington, District of Columbia, of the first part, and Mrs. Mary K. Phillips, of the same place, of the second part, witnesseth:

That said parties of the first part, for and in consideration of the sum of one thousand four hundred and ninety ($1,490) dollars, in lawful money of the United States, to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted,

123 bargained, sold, aliened, enfeoffed, released and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release and convey unto the said party of the second part, her heirs and assigns, forever, all that certain piece or parcel of ground and premises situate, lying and being in the city of Washington, District of Columbia, and known and distinguished upon the ground plat or plan of said city as lot numbered one hundred and thirty-one (131), and part of lot numbered one hundred and thirty (130), twenty-four (24) feet four inches front by eighty (80) feet deep, containing one thousand nine hundred and forty-six (1,946) square feet of ground, in B. F. Gilbert's recorded subdivision of square numbered six hundred and seventy-five (675), recorded in the aforesaid city surveyor's office, book of subdivisions,

124 liber C. H. B., page 319, together with all the improvements, ways, easements, rights, privileges, appurtenances and hereditaments to the same belonging or in any wise appertaining, and all the

remainders, reversions, rents, issues and profits thereof, and all the estate, right, title, interest, and claim whatsoever, either at law or in equity, of the said parties of the first part, of, in, and to the said pieces or parcels of land and premises.

To have and to hold the said pieces or parcels of land and premises with the appurtenances unto the said party of the second part, her heirs and assigns, to her and their sole use, benefit and behoof, forever.

And the said parties of the first part, for themselves and for their heirs, executors, and administrators, do hereby covenant, promise and agree to and with the said party of the second part, her heirs
125 and assigns, that they, the said parties of the first part, and their heirs, shall and will warrant and forever defend the said pieces or parcels of ground and premises and appurten'ces, unto the said party of the second part, her heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, by, from, under, or through them or any of them.

And further, that they, the said parties of the first part and their heirs, shall and will at any and at all times hereafter, upon the request and at the cost of the said party of the second part, her heirs or assigns, make, execute, deliver and acknowledge all such other deed or deeds, or other assurance in law for the more certain and effectual conveyance of the said pieces or parcels of land, and premises, and appurte-
126 nances, unto the said party of the second part, her heirs or assigns, as the said party of the second part, her heirs or assigns, or her counsel learned in the law shall advise, devise, or require.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

The erasor' in the twenty-first line of the words "part of," also interlining on the twenty-fourth line with the words "four inches," was done before signing.

B. F. GILBERT. [L. S.]
ALMYRA J. GILBERT. [L. S.]

Signed, sealed, and delivered in the presence of—(having first been duly stamped)—

FRED'K ARTES.
J. W. MARLORY.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, John B. Motley, a notary public in and for the county aforesaid, do hereby certify that B. F. Gilbert and Almyra J. Gilbert, parties
127 to a certain deed bearing date on the 22d day of December, A. D. 1871, and hereto annexed, personally appeared before me, in the county aforesaid, the said B. F. Gilbert and Almyra J. Gilbert, being personally known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Almyra J. Gilbert being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this 29th day of December, A. D. 1871.

[SEAL] JOHN B. MOTLEY,
Notary Public.

Recorded Jan. 2d, 1872, in liber . No. 664, folio 336, et seq.

128 *Order directing issues to be tried in circuit court.—Filed March* 30, 1874.

In the supreme court of the District of Columbia.

WILLIAM G. PHILLIPS
vs.
BENJAMIN F. GILBERT ET AL. } 3272. Equity docket 12.

This cause coming on to be heard upon the pleadings and proofs, and having been argued by counsel, it is, this 30th day of March, 1874, ordered that the following issues be tried before a jury in the supreme court of the District of Columbia, holding a circuit court, under the direction of the justice presiding in said circuit court, viz:

1. Whether or not said Gilbert is indebted to the said Phillips for work done and material furnished by the said Phillips for the said Gilbert, at his request, in the construction and building of the six brick buildings situate on lots 123, 124, 125, 126, 127, 128, and 129, in B. F. Gilbert subdivision of square 675, included in the notice of lien filed in this cause.

129 2. How much, if anything, is due from the said Gilbert to the said Phillips for work done and material furnished by the said Phillips for the said Gilbert in the building and construction of the said six brick buildings situate on said lots 123, 124, 125, 126, 127, 128, and part of lot 129 (being that part of said lot 129 not conveyed to said Phillips), in said subdivision of square 675, included in the notice of lien filed in this cause, after deducting all payments and other proper claims by way of set off or recoupment. And it is further ordered that, upon the trial of said issues, the complainant in this cause shall be plaintiff, and the said Gilbert shall be defendant, and that upon the trial of said issues the answer of the defendant and the plaintiff's bill and the depositions now on file may be read, and that either party may offer any competent evidence under the directions of the presiding justice. And all further directions are reserved until after the trial of said issues.

By the court.

A. WYLIE, *Justice.*

130 *Verdict of jury in circuit court. Filed June* 14, 1875.

In the supreme court of the District of Columbia.

WILLIAM G. PHILLIPS, PL'FF,
vs.
BENJAMIN F. GILBERT, DEF'T. } At law. No. 12,382.

Now comes here as well the plaintiff, by his attorneys, Messrs. Appleby & Edmonston, as the defendant, by his attorney, Mr. Totten, and a jury of good and lawful men of this District, to wit, Wilson E. Brown, Eslin D. Read, Benjamin Summy, Solomon P. Giddings, Andrew Kramer, William R. Fowler, Patrick Clark, Edward Gorman, William S. Horton, Peter Vessels, Thomas R. Burly, and William P. Thomas, who being duly sworn and affirmed to well and truly try and true answer make to the issues in this case sent from the equity court, on their oath say, in answer to the first issue, that the defendant, Gilbert, is indebted to the plaintiff, William G. Phillips, for work done and material furnished by the said Phillips for the said Gilbert, at his request, in the

construction and building of the six brick buildings situate on
131 lots 123, 124, 125, 126, 127, 128, and 129, in B. F. Gilbert's subdivision of square 675, included in the notice of lien filed in equity cause No. 3272, in this court.

In answer to the second issue they find that the sum of four thousand and twenty dollars is due from the said Gilbert to the said Phillips for work done and materials furnished by the said Phillips for the said Gilbert in the building and construction of the six brick buildings situate on said lots 123, 124, 125, 126, 127, 128, and part of lot 129 (being that part of lot 129 not conveyed to said Phillips), in said subdivision of square 675, included in the notice of lien filed in said equity cause, after deducting all payments and other proper claims by way of setoff or other recoupment in respect to the same, and the court orders the findings of the jury to be certified to the equity court.

1875, June 14.

A true copy. Test:

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Ass't Clerk.

132 *Decree in special term dismissing bill. Filed July* 8, 1875.

In the supreme court of the District of Columbia.

WM. G. PHILLIPS
vs. } 3272. Equity dock., 12.
B. F. GILBERT ET AL.

This cause having come on to be heard on the pleadings and proofs, and having been argued by consent, it is this 8th day of July, A. D. 1875, ordered, adjudged, and decreed that the bill in this cause be and the same is hereby dismissed with costs.

Appeal to gen. term.

From which an appeal is prayed by complainants in open court, which is hereby allowed, and the bond to be given for costs is fixed at one hundred dollars.

By the court.

A. WYLIE, *Justice.*

133 *Appeal bond. Filed July* 27, 1875.

In the supreme court of the District of Columbia.

WILLIAM G. PHILLIPS
vs. } 3272. Equity docket, 12.
BENJ. T. GILBERT ET AL.

The plaintiff having appealed to the general term from the decree pronounced against him in the special term on the 8th day of July, 1875, and Robert Campbell, his surety for themselves and each of them, their and each of their heirs, executors, and administrators, appearing and submitting to the jurisdiction of the said general term to the extent of one hundred dollars, the amount fixed by the order allowing the said appeal, hereby undertake to pay the decree of said general term for the costs of

said appeal, which decree of said general term they agree may be pronounced against all of them.

W. G. PHILLIPS. [SEAL.]
ROBERT CAMPBELL. [SEAL.]

Witness:
W. E. EDMONSTON.

Approved this 27th day of July, 1875.

A. WYLIE.

134 *Decree in general term, February 19th, 1876.*

In the supreme court of the District of Columbia. In general term, February 19th, 1876.

WILLIAM G. PHILLIPS, COMPL'T,
vs.
BENJAMIN F. GILBERT ET AL., DEFT'S. } 3272. Equity docket, 12.

This cause having been heard upon the record from the special term, and been argued by counsel and submitted to the court, it is thereupon, this 19th day of February, 1876, ordered, adjudged and decreed that the decree in the special term of July 8, 1875, from which the complainant's appeal to this court was prosecuted, be, and the same is hereby affirmed with costs.

By order of the court.

Appeal to Sup. C't of U. S., March 4, 1876.

WILLIAM G. PHILLIPS
vs.
BENJ'N F. GILBERT ET AL. } 3272. Equity doc., 14.

The complainant, by his solicitors, Appleby & Edmonston, here now in open court pray an appeal from the decree of the court herein at the present term, and the same is allowed.

By order of the court.

135 In the supreme court of the District of Columbia, the 14th day of October, 1876.

WILLIAM G. PHILLIPS
vs.
BENJAMIN F. GILBERT ET AL. } In equity. No. 3272. On appeal.

Know all men by these presents that we, William G. Phillips and Robert Campbell, are bound unto the above-named defendants in the sum of two hundred dollars, to be paid to the said Benjamin F. Gilbert and the other defendants, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 14th day of October, 1876.

Whereas the above-named William G. Phillips has prosecuted an appeal to the Supreme Court of the United States to reverse the decree

rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named William G. Phillips shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. G. PHILLIPS. [SEAL.]
ROBERT CAMPBELL. [SEAL.]

Sealed and delivered in presence of—
W. E. EDMONSTON.

Approved this 14th day Oct., 1876.

D. K. CARTTER,
Ch'f Justice.

136 *Clerk's certificate.*

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 14th day of October, 1876.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. C. WILLIAMS,
Assistant Clerk.

(Indorsment on cover:) No. 314. William G. Phillips, appellant, vs. Benjamin F. Gilbert. District of Col. Supreme Court. Filed 5th December, 1876.

87,

United States Supreme Court.

PHILLIPS,
vs. } No. 87.
GILBERT, ET AL.

VIII. Assignment of error, as to the paper filed and called an understanding to discharge lien.

Such a paper not being engrafted on the proceedings by motion, or set up in the pleadings, or mentioned in the proofs, is no part of the record.

Sargent *vs.* State Bank of Indiana, 12 How., 384–5.

This paper, filed without notice to the complainant or without his knowledge, was, as shown by its title and date, entered into after this suit in equity. If it was a defence, the same arising after suit begun can only be set up by cross-bill. Story's Eq. Pleading, section 393.

No cross-bill was filed.

If there be any authority for filing such a paper, it is the 11th section of the act of 1859. (See Brief, p. 32.) There is no other law relating to undertakings except the sections of Revised Statutes D. C., which relate to replevin and attachment suits. No undertaking was authorized in mechanics' lien cases before the act of 1859, but the want of such authority was not the reason of the passage of the act of 1859, and of the repeal of the act of 1833. The act of 1859 was passed in consequence of this Court's opinion in Winder *vs.* Caldwell, 14 How., 445. The act of 1867, providing for the first time a remedy in equity for cases like

the present, is silent as to the right of the owner to release the lien after suit begun in equity. There is a policy for the silence.

Carroll *vs.* Coughlin, 7 Abbot, Pr. N. S., 74–5.

Before suit begun the owner has no opportunity to contest the validity of the lien, and if under the act of 1859 he could have filed an undertaking before action to enforce the lien, commenced under that act, he can still do it before suit begun in equity. After suit begun in equity, he is given an opportuuity to contest the lien, and he was not, therefore, provided by the act of 1867 with authority for releasing it by an undertaking. That act being in amendment of judicial proceedings, makes it imperative on the court to subject by decree the *res* to the satisfaction of plaintiff's demand—a circumstance which is inconsistent with the theory that the *res* can, pending the equity proceedings, be released by an undertaking. The only cases for which provision to file an undertaking is made by the act of 1859, are in proceedings commenced under that act. As that act, in the 6th section, mentions what these proceedings are to be, and as they are the only proceedings for the enforcement of a mechanics' lien, mentioned in the act, it is clear that it is in such proceedings only that an undertaking is authorized to be filed, and those proceedings do not mention nor contemplate any proceeding by bill or petition in equity—*ergo* in no equity suit can an undertaking be filed.

As the act of 1859 assures a mechanic that he may begin labor and furnish materials for the building of a house, and have a lien on the building and on the land on which it is erected by filing notice before doing or finishing his work and furnishing materials; the act thus makes the building and land a surety for his pay, and the court will, at the instance of the mechanic, exert every power to prevent the exoneration of such surety without the mechanic's assent. The 11th section will be strictly construed inasmuch as the mechanic, who is not required to have notice of any attempt

to displace his lien, may continue to furnish labor and materials after giving the requisite notice to acquire the lien and in reliance on the lien which his notice has secured to him.

It is therefore submitted that the undertaking filed in this cause ought not to be noticed by the court, and cannot interfere with this court's authority to enforce the lien against the *res*.

The undertaking cannot be filed so as to discharge the lien after a sale and conveyance by the debtor.

The debtor cannot file the undertaking, for how can he release "his property" when he has no longer the property to release, having parted with it, and the purpose of the undertaking is to release the property of the debtor. There is sound reason why the debtor should not have such power after a sale, because he might sell or convey to an irresponsible person for the sole purpose of having him become a surety on the undertaking of the debtor.

The vendee cannot file the undertaking becouse he is not the defendant to whom the privilege is given by the 11th Section.

The word "defendant," as used in said section, evidently means only the debtor. He is the only person who can be made a defendant by the mechanic, under the act of 1859, (Section 3.) This word is used in the same sense in all the other parts of the act, (see the 5th and 7th sections, where the word is used and can mean only the debtor,) and must be considered as used in this sense in the 11th Section.

Pitte *vs.* Shipley, 46 Cal., 154.

Where a person other than the debtor is meant by the act as in the 10th Section, the words "any person interested" and the words "the party aggrieved" are used.

There is no good reason why the vendee should have this privilege, for he can withold sufficient of the purchase money to pay the lien, or before the sale compel the debtor to release the lien by an undertaking.

If the undertaking can be filed after a sale and disposal of the property by the debtor, it must be executed by all the defendants who are parties interested; for in no other way can the interests of the parties be released as the undertaking only releases the property of the defendant executing the undertaking. In this case the company does not execute the undertaking unless Bigelow's signature thereto binds the company.

In any event, the undertaking filed to work a discharge of the lien must comply with the letter of the statute, which is broad enough to embrace a judgment in an action of debt or assumpsit.

The undertaking hereinfiled, is restricted to a judgment upon a claim for lien—in which case the limitation is limited to one year (33;) in case of debt or assumpsit it is three years. For other differences in these actions, see Phillips on Mechanics' Liens, sections 434 to 436.

A judgment on the lien, strictly speaking, is not susceptible of payment.

The undertaking in this case is also defective, in that it does not state who are defendants and who the surety or sureties.

In no event, can the undertaking when properly executed and filed release more than the lien created by the act.

It does not release the *lis pendens* of equity acquired by service of *subpoenæ* on the owner of the property at the time of service, and it does not release any equities arising by virtue of the lien, nor any rights by reason of such equities, such *e. g.* as exist against a mortgagee or purchaser who has withheld enough from purchase or loan to pay the lien.

The form of undertaking used in this case contemplates some subsequent action on the part of court or the parties to effect the desired release of the property, such as an order on the undertaking or an entry by the clerk. (See 3 Daly, 180–1.)

The act of 1859, does not say that upon the filing of the undertaking the property shall be released, but gives to the

defendant the privilege of having it released on the filing of an undertaking. Tbis privilege he may waive or by his conduct, be estopped from asserting.

39 N. J., Law, 11;
11 How., 493.

The defendants not having relied upon this undertaking, may be held to have waived it, and as the undertaking is no part of the record, we are entitled to a decree for the sale of the property.

That the relief we ask, may be given in a case like the one before the court, See Kidder *vs.* Aholtz, 96 Ill., 478; Phillip's Mechanics' Liens, §338.

APPLEBY & EDMONSTON,
For Appellants.

IN THE

Supreme Court of the United States.

October Term, 1879.

WM. G. PHILLIPS

vs.

BENJAMIN F. GILBERT, HORACE BOUGHTON, W. BOWEN MOORE, AND CONNECTICUT GENERAL LIFE INSURANCE COMPANY.

No. 87.

BRIEF OF APPELLANT.

GEO. F. APPLEBY.
W. E. EDMONSTON.
for Appellant.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

October Term, 1879.

WM. G. PHILLIPS

vs.

BENJAMIN F. GILBERT, HORACE BOUGHTON, W. BOWEN MOORE, AND CONNECTICUT GENERAL LIFE INSURANCE COMPANY. } No. 87.

Brief of Appellant.

This is an appeal from the decree of the Supreme Court of the District of Columbia, dismissing the Bill of Complaint.

Abstract of Pleadings.

The bill of complaint was filed June 11, 1873, to enforce a mechanics' lien, for work done and labor performed by Phillips for Gilbert, on six dwelling houses on I street north, between North Capitol and First streets east, on lots 123 to 128, and part of 129, in B. F. Gilbert's recorded sub-division of square 675, in Washington City.

The bill sets forth, that Phillips had entered into a contract with Gilbert to furnish the materials for, and build six dwelling houses on certain described lots, in the City of Washington, of which Gilbert was the owner, for the aggregate sum of $32,200, to be paid in instalments every two weeks, in proportion to the work done, on account of

which there was due from Gilbert to Phillips $5,000, and that on the 23d day of May, 1872, Phillips filed in the office of the Clerk of the Supreme Court of the District of Columbia, a notice of his intention to hold a lien on said buildings and lots, a copy of which notice is made an exhibit to the bill, and that the buildings were not finished. (See Rec. p. 3, for copy of notice of lien.)

The bill further states, that Gilbert, prior to the filing of the notice of lien, had encumbered part of the property by two deeds of trust, specifically mentioned and described, and which were made to secure the notes of Gilbert, and that Gilbert, by deed dated December 16, 1872, had conveyed in fee simple the property covered by the mechanics' lien to Boughton & Moore, who had encumbered the same by six deeds of trust, dated February 1st, 1873, and recorded February 5th, 1873, made to secure six notes of Boughton & Moore for $6,000 each, payable to the Connecticut General Life Insurance Co.

The bill prays for a sale of the property and for general relief.

On the 25th day of June, 1873, an undertaking, for the purpose of releasing said lien, was approved and filed among papers in this cause (Rec. p. 5), but is not noticed in pleadings or proofs.

On September 9th, 1873, Gilbert filed an answer, claiming that he had paid Phillips in full for the work done and materials furnished, and while admitting the filing of the notice of lien, excepts to it as insufficient and void, because the same is made in *gross* against all the houses, without specifically setting out the value of the work and materials put upon *each* house.

Boughton & Moore, on September 8th, 1873, filed a demurrer, stating therein, for cause of demurrer, that the claim for lien is void, because made in gross upon six

separate lots of ground, without specifically setting forth the amount claimed upon each lot for the work done or materials furnished thereon.

The Connecticut General Life Insurance Company, by its agent, J. G. Bigelow, on December 19th, 1873, filed an answer, admitting the making of the loan to Boughton & Moore, of $36,000, secured on said lots, and setting forth that when it made loan upon the security of said lots, Phillips executed and delivered to the company a release, in writing, of said lots, from the effect and operation of the lien filed by him, and that upon the faith of said release the company made the said loan to Boughton & Moore, and the company say that Phillips ought to be estopped from proceeding upon said claim for mechanic's lien.

The said release having been lost or mislaid, the company files with the answer an alleged substantial copy thereof. (Rec., page 8.)

Gilbert, on December 24th, 1873, filed an amended answer stating, upon information and belief, that the mechanic's lien claimed by Phillips, and sought to be enforced, was fully discharged and released by Phillips, in writing, some time in January, 1873, and claiming that the said Phillips having so released and discharged said claim for lien, can have no relief in a court of chancery.

Replication was filed to the answers and the demurrer set for hearing.

Testimony was taken and the cause brought to a final hearing, upon all the proceedings had; whereupon, the justice holding the equity court, March 30, 1874, directed the following issues to be tried in the circuit court by a jury:

1. Whether or not Gilbert was indebted to Phillips on account of the work done and materials furnished in the construction of the houses included in the notice of lien.

2. How much, if anything, was due from Gilbert to Phillips after deducting all payments and other proper claims by way of set-off or recoupment.

The jury found affirmatively upon the first issue, and upon the second they found that there was due from Gilbert to Phillips the sum of $4,020, for work done and material furnished by Phillips for Gilbert, in the construction of the said building, included in said notice of lien, after deducting all payments and claims by way of set-off or recoupment.

The finding of the jury being certified to the court, holding a special term for Equity matters, the cause was again heard and the decree passed dismissing the bill with costs.

An appeal was taken to the Court in General Term, and by the latter court the decree of the court in Special Term was affirmed, from which decree the appeal to this court is taken.

Abstract of Proof.

Upon the issues of fact, made by the pleadings, the witnesses called to testify in behalf of the complainant were the complainant himself, Lloyd P. Pumphrey, S. H. Phillips, Charles Kennedy, J. C. Eastwood, E. G. Pumphrey, and Thomas W. Smith, and in behalf of the defendants, the defendants W. Bowen Moore and Benj. F. Gilbert, and one J. G. Bigelow testified. In this abstract we have incorporated some matters to which we interposed objections, and as to which the record will show.

The complainant, Wm. G. Phillips, proved the contract with Gilbert, as set out in the bill. That part of the work, the details of which are given, had been done on said houses prior to the filing of the bill in this cause; which work was of the value of over $16,000, and the total received from all sources on account of said work prior to the filing of the bill, was $12,080. Included in the

amount paid was two drafts of $1,000 each, and $2,000 in lumber, paid by Boughton & Moore, and a note for $3,000, given by Gilbert, and which was afterwards paid. (Printed Rec., page 10.)

On cross-examination, the witness, Wm. G. Phillips, testified that he commenced work about the first of September, 1871. That Gilbert was to pay for the work as fast as it was done, and, in part pay, witness was to take two lots, clear of encumbrance, Gilbert stating there was a small encumbrance on the ground, which he would remove. That witness stopped work for Gilbert previous to the sale to Boughton & Moore, but resumed work for Boughton & Moore shortly after the loan by the Insurance Company to them; supposed he was at work for them, but that Gilbert was still interested in the buildings. The arrangement made with Boughton & Moore was this:

"The property was advertised for sale by J. C. Eastwood, as trustee, to secure a note of M. Eastwood of $11,000 and interest, which Mr. Gilbert had previously put on the ground, including my lots; at the public sale, to protect myself, I bought the property in; Messrs. Boughton & Moore called to see me in Mr. Eastwood's office, in M. Eastwood and Chas. Kennedy's presence, and persuaded me to let them have the property and not to take a deed; they would get the loan of $36,000 on the property and pay off the amount due me at the time. I first refused to do it. Mr. Moore thought it hard that I should want to hold the property, and thought I ought to be satisfied with the amount coming to me. He promised that I should be paid from the loan $4,000 and a $3,000 note unpaid at the time. After these were paid, he and Bigelow, the agent of the loan, both stated that there would be, after paying those up, about $9,000 to be put on the work. They were to allow the difference in the price of material. They got the loan on the property and the work went on, and they paid on awhile and furnished some lumber. Boughton & Moore employed me to go on with the work on the houses. The contract was to be continued right along, and I was to be paid as the work went on. At the time I stopped work I had done

more work than there was money, and was informed by the agent of the insurance company that no more money would be paid; that Boughton & Moore had drawn all the money including the $4,000 due to me." (Printed Rec. p. 11.)

The complainant further testified that he was paid by Boughton & Moore $4,000, of which $1,000 was by draft, Boughton & Moore, $1,000 by draft on Hubbard property, and $2,000 by lumber through Boughton & Moore. This was up to June 11, 1873. (Rec. p. 11.)

That the note for $3,000 was in addition to the $4,000 which it was agreed by all parties was due to him on these houses at the time of the transaction had in Eastwood's office. (Rec. p. 11.)

That the money paid by Boughton & Moore was to go towards finishing up the houses or continuing the contract, and did not include the three thousand dollars or the four thousand dollars which witness claimed at the time and they agreed to, and which was to be drawn the first money from the loan. The understanding was that witness was to continue on the work of the contract and receive $1,000 every two weeks until $9,000 was paid on the contract, and they were to furnish other money to complete the contract outside of the loan. Two of this, witness got in money, and two in lumber, as above stated. (Rec. p. 12.)

The complainant being recalled, testified that previous to the purchase of the property of Boughton & Moore, on December 16, 1872, the value of the work done was over $12,000, and the amount paid was $8,000, including the deed of trust of $3,000, and that there was no written agreement between him and Boughton & Moore. (Rec. p. 16.)

LLOYD P. PUMPHREY

testified that he had been Phillip's foreman; had worked on the six houses built for Gilbert; that he did not know

the property by the lots, but there were two houses on the corner, then these six begin. That at the time of the sale of these houses by J. C. Eastwood, as trustee, they were worth, exclusive of the lots, $12,000, and at the time of the filing of the bill (June 11, 1873,) they were worth a little over $16,000. (Rec. pp. 12 and 13.)

S. H. Phillips

testified that he thought the houses were more than half completed on June 11, 1873. (Rec., p. 14.)

Charles Kennedy

testified that he was auctioneer at the sale made by J. C. Eastwood. The lots were bid off to complainant. Was present at a conversation between Phillips and Boughton & Moore, which took place some days after the sale. The arrangement by which they were to have the houses seemed to be satisfactory to Mr. Phillips. They were to pay him, whatever it was (Rec., p. 14), but witness did not know what the arrangement was.

On cross-examination, he said the sale occurred in October or November, 1872.

J. C. Eastwood

testified that as trustee under deed of trust from Gilbert, he offered the property (mentioned in the bill) for sale, and it was bid off to Phillips. After the sale, but before he (Phillips) complied with the conditions of sale, he had an arrangement with Boughton & Moore, by which he was to give up his claim, and they were to settle with Mr. Eastwood and Phillips. The amount was mentioned and not disputed, and seemed to be satisfactory. They were to pay Phillips, after they got the loan through, his claim for services and materials for the houses and the deed-of-trust note held by Eastwood. (Rec., pp. 14–15.)

E. G. Pumphrey

testified that he heard Bigelow and Boughton & Moore say, that as soon as Mr. Eastwood was paid off, they would draw a draft to pay Phillips his bill or lien on the houses. That Bigelow, for three or four weeks, promised Phillips he would draw a draft; but one day, when Phillips asked him to draw a draft for him, Bigelow said he would not until Boughton & Moore paid the draft for $4,000, which he had drawn for them on the insurance company, and which they had used for other purposes. Phillips did not get the $4,000 draft. (Printed Rec., p. 15.)

Thomas W. Smith

of the firm of Wm. P. Cottrell & Co., lumber dealers, testified that Boughton & Moore bought $1,000 worth of lumber, to be delivered to order of Mr. Phillips, to those houses (which are mentioned in the bill).

From my conversation with them, the lumber was to be furnished under their contract with him and in part payment.

In their negotiations with us, they stated to us that there was not money enough coming from the insurance companies to finish the houses. They wanted us to take a deed of trust for $1,000 on each house as payment for lumber. Said deed of trust to be given when the houses were so far advanced that they could raise money enough on them to take up Mr. Phillips' lien. I understood there was a $6,000 deed of trust on each house held by the insurance companies.

The defendant,

W. Bowen Moore,

testified, on behalf of the defendants, that between the 16th and 30th of December, 1872, he made a contract with the complainant to complete the six houses, mentioned in the bill, in the manner and on the terms made between him

and Gilbert; the complainant to be paid by drafts on the insurance company, as the work progressed, not exceeding $1,000 every two weeks.

That Gilbert was owing Boughton & Moore a large amount at the time we purchased the houses, and he offered us these houses, subject to legal encumbrances, the margin to be credited on his account. We agreed to take the houses as they stood, provided he, Gilbert, would substantiate the representations he had made, as to encumbrances and that Phillips would carry out his contract. In accordance with this agreement, witness went to Mr. Eastwood's office and had an interview with Mr. Phillips, and there learned that Phillips had bid the houses in at a sale made under a deed of trust, given to secure Mr. Eastwood, and that the terms of the sale had not been complied with; that there had been a dispute between Eastwood and Gilbert, as to the validity of the sale, and that unless satisfactory terms were made Gilbert would apply to have the sale set aside. We (Boughton & Moore), concluded it best to make such terms as would not compromise us in the future and would allow Gilbert's interest to be credited on his indebtedness to us.

The first conversation witness had, was with Eastwood and Gilbert. Witness, for Boughton & Moore, then, on or about the 27th of December, 1872, agreed with Phillips to take the property, and take his contract as it stood between him and Gilbert, and pay him what was justly due him from Gilbert, for work done on these houses prior to this time; on this bargain Phillips went to work on these houses, when we made the loan from the Connecticut General Life Insurance Company, of $6,000 on each house. "The money arising from this loan was to be disbursed by the agent of this company, first to pay off the existing encumbrances, and then towards the completion of the houses." This claim for a lien of Phillips was not

considered one of the encumbrances, either by the agent of the company, Mr. Gilbert or ourselves, (Printed Rec., p. 18.), because Gilbert represented that he had paid Phillips in full, excepting a deed of trust he had given Phillips, which deed of trust, we understood was the amount due Phillips. In the next place, the agent of the company, during the negotiations for the loan, informed us the lien had been filed against the entire row, consisting of twelve or more, and had been released from time to time in other houses and should not stand in the way of the loan, we were negotiating; and after the loan was consummated, the agent represented that a release of the lien was in the hands of the company. About this time Boughton approved what witness had done, after talking the matter over with Phillips, and after this, all details were transacted between Mr. Bigelow and Mr. Phillips. In this bargain we agreed to pay Phillips whatever was justly due for the work done for Gilbert. (Printed Rec., p. 19.).

JONATHAN G. BIGELOW,

on the part of the defendants, testified that, in December, 1872, he was an agent of the defendant, the Connecticut Gen. Life Ins. Co., and after that time attended to the negotiation of a loan from his company to Boughton & Moore on lots 263 to 268 inclusive of Boughton's subdivision of square 675. The first talk, looking to a loan on these, lots was with William G. Phillips, to whom witness expressed the opinion he could negotiate a loan of $36,000 with his company. Mr. Phillips got the abstract (of title) of said lots, which showed among other things a lien filed by himself of $27,000. Witness understood that previously Phillips had bought the lots at public auction, and the loan was to have been made for and in behalf of Mrs. Phillips' in which case the lien of $27,000 no longer constituted a claim upon the property. Mr. Phillips accordingly wrote

a release of that lien signed by himself, which, with the abstract witness took with him to Hartford, and presented the same to the president of the Insurance Co. (Printed rec., p. 19.) The loan was accepted conditionally, *i. e.*, the company could make no advances on it until after February, 1873. Witness does not know what became of release of lien; it may be possible that he returned it to Mr. Phillips, but he has no recollection of returning it. In looking over abstract with the president of the company, a special remark was made about the size of the incumbrance, when witness called his attention to the fact that witness held, in his hands, a release of the lien. Before Feb. 1, 1873, Mr. Phillips by some arrangement, the details of which witness does not understand, sold the houses to Boughton & Moore. Witness did not understand, however, whether the lien was released, but understood Boughton & Moore were to pay Phillips the just claim he had upon said property for work done under the contract with Gilbert.

The release was delivered to witness to show the lien was released, and it is witness' impression he left the release with the president of the company. The company made the loan on the faith of the release of the lien. Witness supposed that Phillips was going to get the loan in his name. After the transfer to Boughton & Moore, witness understood the loan was to be perfected for Boughton & Moore. A note for $3,000 was lifted, $14,373 paid to Eastwood, and $4,500 paid to Burnstine. Prior to the filing of the bill, witness paid out of the loan $4,000 to Phillips; $2,000 in money and $2,000 in lumber; and since the filing of the bill paid him $2,000, but under a new arrangement—that has nothing to do with this subject. (Printed rec., p. 20–21.)

Q. You said yesterday, that it was possible that you gave the release of mechanics' lien that was executed by Phillips, back to him?

A. I said I had no remembrance of it, of returning the release to Phillips. "The release, I do not know positively what became of it." (Printed rec., p. 21.)

On cross-examination witness stated that he went to Hartford in behalf of Mr. Philips to get a loan for him; thinks it was in Dec. 1872, or Jan. 1873; the release of lien was given to witness then; he thinks he did not go to Hartford for Boughton & Moore, and had no idea when he made application for the loan that it was for any one else than Mr. Phillips, and it was made known to the company that Phillips was the purchaser and the then owner of the property, although the abstract showed the title in B. F. Gilbert, and witness called attention to the fact that the lien was filed by Mr. Phillips, the owner. "The lien was so large of record that it precluded at once all possibility of making a loan of thirty-six thousand dollars on the property, because it would have required over forty thousand dollars to raise the prior encumbrances. Hence it was made to appear that the lien was not really an incumbrance."

Mr. Phillips at this time represented that there was about seven thousand dollars embraced in the lien, but witness represented to the company that it was immaterial whether there was any claim by virtue of this lien because witness held a release of it. This was when Phillips owned the property, as witness supposed. After the loan was made witness understood the $3,000 note was embraced in the seven thousand dollars; after the property was transferred to Broughton & Moore, and before the loan was made to them, witness saw the president of the company at Hartford and incidentally mentioned the fact of the transfer to Boughton & Moore, but did not go there for that purpose. (Printed rec. p. 22.)

"Q. This money coming from this loan was to be disbursed by you or through you, was it not?

A. Not necessarily.

Q. What was the fact as to its disbursement?

A. Some of it was disbursed through me, and disbursements were made directly by the company.

Q. The company did not advance all this money to Boughton & Moore at the time the loan was made?

A. No, sir.

Q. Were not encumbrances paid by the company or by you, its agent?

A. Paid by the company.

Q. Was it not understood by you and by Boughton & Moore, that the money due to Mr. Phillips, on account of the lien, should be paid out of this loan to Boughton & Moore?

A. Yes, sir; all that was due to Mr. Phillips was to have been paid out of the loan; I never understood anything to the contrary.

Q. Now, please state how this money was drawn, with which these encumbrances were paid?

A. They were drawn on drafts to the order of Boughton & Moore; drawn on the company by me, and Boughton & Moore would indorse the draft that would go to the parties holding the encumbrances, so that all disbursement in the main was made directly by the company." (Printed Rec., p. 23.)

Q. When did you first know this release of lien was lost?

A. I first knew of that being lost, I think it was Mr. Moore, who called my attention to it, and I said to him I thought I had it and I searched for it, but did not find it.

Q. When was that?

A. It was since June, last summer (1873). The abstract and lien, I supposed, were together until last fall, sometime. I saw a release in my safe, and casually glancing over it, I thought it was, at the time, the release of the lien in question. But upon re-examination I found it to be a release of the lien filed by Mr. Phillips on other property in the same square.

Q. Do you remember preparing a release of the lien on the property, in question, and taking it to Mr. Phillips to get him to execute in April, 1873?

A. No, sir.

Q. I show you a paper now marked Exhibit J. G. B. (paper produced by complainant and filed). [See copy of

same, Printed Rec., p. 27.] and ask you if it is in your handwriting?

A. Yes, sir; that is my handwriting. I do not remember anything about the paper, and the only thing I can see that would prompt me to get a paper of that kind executed, would be for the company to get the first lien of the record; I cannot conceive, now, any other object. (Printed Rec., p. 24.)

On re-direct examination, the alleged copy of discharge of lien, filed with the answer of the Insurance Co. being shown to the witness, Bigelow, he testified (against objection), that his remembrance was all he had to go by; that the language was, to the best of his knowledge, substantially the same as used here; would not say the release was couched in the exact language. The purport and effect was identical. The release delivered by Mr. Phillips to witness was in month of December, 1872, or from first to middle of January, 1873. Witness' understanding was that the loan, as negotiated by Mr. Phillips, should be turned over just as it was to Boughton & Moore. (Printed Rec., p. 25.)

Re-cross-examination of the witness, BIGELOW.

Q. Did you not state to Mr. Phillips that you could, if you chose, have released the lien at any time, but that you had a release of his which you got from him when he was to get his loan?

A. The release that I supposed was on this property turned out to be a release of other property, and at the time I had such conversation with him, it was an established fact that there was a dispute between him and Boughton & Moore as to his claim under the lien.

Q. If, as you say, Mr. Phillips gave you a release of this lien, was it not given with a distinct understanding that it was to be used only in case a loan was made to him?

A. There was no such understanding, and could not have been from the fact that the question, as to whether any one could have been interested in the loan, as the principal, was not for a moment entertained besides himself.

Witness would not be certain that he did not go to Hartford for Phillips in November, but it was after the sale; remembers sending a telegram. [Exhibit J. G. B., No. 1, is here shown witness.] Does not think he had abstract with him then. (Printed Rec., p. 26.)

On re-direct examination, witness, Bigelow, stated that the conversation with Mr. Phillips about release last mentioned, took place subsequent to institution of this suit, and about three or four months ago. (Examination was March 12, 1874.)

Witness having refreshed his memory since the last session, states that the Exhibit J. G. B. [the release prepared for Phillips to sign] was drawn out by witness with the view of reducing the encumbrance on three houses to that only held by the company, namely, $6,000 to a house; the object being to raise $3,000 in lumber from Cottrell by giving three secured deeds of trust. That it was known at this time, April 28th, 1873, to witness and the President of Company, that the abstract and release of lien were missing, and this release was written out for the the purpose before mentioned, and because of the loss of the other. He does not mean to say that he would have put the original on record without first having consulted Mr. Phillips. (Printed Rec., p. 27.)

The $4,000 paid to Phillips, partly in money and partly in lumber, was on account of the work done after the loan to Boughton & Moore. (Printed Rec., p. 27.)

The defendant, B. F. Gilbert, testified that the price of the corner lot conveyed to Phillips was to be $1 per foot, and that of the adjoining lots seventy-five cents per foot. That he only knew from hearsay about Phillips executing a release of his lien for the purpose of getting a loan from the Insurance Company. That he did not consider he owed Phillips anything at the time Boughton & Moore took the property, as he had paid Phillips about

$10,000 in money, property and notes, and that much work had not been done.

Int. Did Phillips agree to take Boughton & Moore for pay for this work?

Ans. I know nothing about it. Gilbert further testified that he believed the sale made by Eastwood, where Phillips was the purchaser, to be a collusion between the parties, and he threatened to institute legal proceedings to set it aside, unless some arrangement was made that the trust under which Eastwood made sale was given before the lien of Phillips was filed, and there was a trust to Burnstine for $4,500 prior to Eastwood's.

Statement.

The appellant, Phillips, by virtue of a verbal contract made on or about August 20th, 1871, between him and the appellee, Gilbert, the owner at that time of the property in the bill of complaint mentioned, began, a short time thereafter, the erection of a row of brick buildings, six in number, on I street, in square 675, in Washington city. (Print. rec., pp. 3, 10, and 12.) The aggregate price to be paid by Gilbert was $32,000; the two middle buildings being $5,700 each, and the other four $5,200 each. (Print. rec. p. 10.) The payments were to be made by Gilbert in installments of such amounts as should be equal to the value of work as and when done. (Ibid.) Each house occupied 21 feet front of the ground and the part of lot on which it was built had a depth of 80 feet. (Print. rec. p. 30.) The ground on which the six houses were erected embraced lots 123 to 128, both inclusive, and a part of lot 129 in Gilbert's subdivision of said square. This is the way the lots were known and described, so long as Gilbert was the owner. Before the completion of the buildings, under the contract above-mentioned, Gilbert conveyed his interest in the property to the appellees, Boughton & Moore, by a deed dated December 16, 1872. (Print. rec. p. 2.)

This ground was then subdivided into six lots, so that each house would occupy a whole lot, and they were designated as lots 263 to 268 both inclusive of Boughton's subdivision. (Print. rec. p. 7.) Previous to the transfer of title by Gilbert to Boughton & Moore, the value of the material and labor furnished and done by Phillips on the six houses, under the said contract, was more than $12,000. (Print. rec., p. 16.) The amount to be credited on account of payments made by Gilbert was about $8,000. This made something over $4,000 due to Phillips by Gilbert at the time of the said deed. Gilbert at that time disputed the amount due, and in this suit disputes it. The matter was referred to a jury by the court below in this litigation, and the jury found in favor of Phillips and gave a verdict for the amount of $4,020. Before the deed to Boughton & Moore, Phillips, for the amount due and to become due on his contract, had filed in the clerk's office of the Supreme Court of the District of Columbia, a notice of his intention to hold a lien on the property in question. This notice was filed on the 23d of May, 1872. (Print. rec., pp. 3, 4 and 10.) The act of Congress, in pursuance of which this lien was filed, is copied and printed in the appellant's brief.

It seems that when Phillips began the building of the houses, the ground was subject to an incumbrance, which Gilbert represented to Phillips as being small, and promised to remove. (Print. Rec., pp. 10 and 11.) That Phillips had agreed to take lots 130, 131, and part of 129, in same square, in part payment of the price of the houses. That these were conveyed to him by Gilbert and wife on Dec. 22d, 1871. (Print. Rec., 33.) That Phillips had given credit to Gilbert for their value. (Print. Rec., p. 4.) That they were to be conveyed to him clear of all incumbrances. (p. 10 and p. 30., and cross-exam. of Gilbert.) That, when conveyed, they were not free of incumbrances. (p. 30.) That Phillips had not been paid for his work as it

progressed. That he became dissatisfied, and would not do any further work until the incumbrances on the said lots conveyed to him were removed. (Print. Rec., p. 29: Gilbert's testimony.) That these lots were subjected to an additional incumbrance by Gilbert, after Phillips had, under his contract, begun the digging out of the foundation. That this incumbrance was a deed of trust to Eastwood, and embraced a part of the ground on which Phillips was building the houses for Gilbert. That, in addition to this, there was a prior deed of trust in favor of one Burnstine, on the property conveyed to Phillips, as well as on the ground on which he was building. That Gilbert had promised to release the entire ground from this last lien. That he did not do so. (Print. Rec., pp. 9, 10, 11, 32.) These acts of Gilbert were followed by the filing of the notice of a mechanic's lien, on the part of Phillips. Subsequently, and we think the record shows conclusively that it was about the early part of November, 1872, the property on which Phillips had his mechanic's lien was offered for sale by public auction, under the Eastwood deed of trust. Phillips and Gilbert were present at the sale. Phillips bid on the property, and it was struck off to him (to use Gilbert's language) for $16,000. (Print. Rec., pp. 29, 18.) J. G. Bigelow, the agent of "The Connecticut Life Insurance Company," which is an appellee here, hearing that Phillips had bought the property, expressed to him the opinion that his company would make a loan of $36,000, on the security of the houses. Mr. Phillips, accordingly, got an abstract of title showing the status of the property. (Bigelow's testimony, p. 19.) He took it to Bigelow, who looked at it, and saw that, among other things, a lien in favor of Phillips for $27,000, was reported against the property. The abstract showed the title to be in Gilbert, subject to incumbrances. (p. 22.)

Bigelow learned from Phillips that the amount due him altogether at that time was about $7,000 (Print. Rec., p. 22,

orig., 80), of which $3,000 was secured by a deed of trust upon the property, making about $4,000 unprotected, save by the mechanic's lien mentioned in the abstract. Bigelow says this lien was "so large of record that it precluded, at once, all possibility of making a loan of $36,000 on the property, because it required over forty thousand dollars to raise the prior incumbrances" (Print. Rec., p. 22); and that "hence it was made to appear that the lien was not really an encumbrance upon the property." (Ibid.)

The manner by which this was made to appear, was the writing by Phillips of a paper purporting to release the lien, and which was done by Phillips in accordance with the suggestion of Bigelow, that inasmuch as he, Mr. Phillips, was the owner of the property, having bought the same at the public sale, and "the loan was to be made for and in behalf of" himself, "the lien of $27,000 constituted no longer a claim upon the property;" that is to say, that he, Phillips, could not have a lien on his own property. Mr. Phillips, acting upon this suggestion, delivered the release to Bigelow, which, together with the abstract, Bigelow took to Hartford, Connecticut, and presented to the president of the company. (Printed Record, pp. 19 and 32.) This paper--writing—purporting to be a release, was placed in the hands of the company's agent, with authority for the company to use it when the loan was consummated. It was to be used only if the loan was made to Phillips; and it was to be returned, in the event of Phillips not getting the loan, and the lien was to remain on the property until Phillips' claim was satisfied. (Print. Rec., p. 32, orig., 119.)

When Bigelow presented to the president of his company the application of Mr. Phillips for the loan of $36,000, he, in company with the president, looked over the abstract which Mr. Phillips had furnished (Print. Rec., p. 20), and "when a special remark was made about the size of the

incumbrance, $27,000," he (Bigelow) called the attention of the president to the fact that he had a release in hand (Print. Rec., p. 20), and he further says that he "made known to the company that William G. Phillips was the purchaser of the property, and the then present owner of the property; although the abstract showed the title in B. F. Gilbert;" and he called the company's "attention to the fact that the lien was filed by Mr. Phillips, the owner." (Print. Rec., p. 22, orig., 78); and that it was immaterial as to how much was due to Phillips on his claim for lien, although Mr. Phillips had represented to him that Gilbert owed about $7,000, because he held in his hand a release which he showed the president; and this was at a time when, as he supposed, Phillips owned the property. (Print. Rec., p. 22, orig., 78 and 80.)

The loan was accepted, provided the company would not be called on to make advances until after the first of February, 1873 (Printed Rec., p. 20), and Bigelow, on the 19th day of November, 1872, telegraphed from Hartford, to W. G. Phillips, as follows: "Boston fire prevents loans till February; all right there; arrange accordingly." The record does not show what became of the writing purporting to release the lien. The loan was not made to Phillips, and he should have had the writing returned to him. It was not kept by the company. Bigelow says: "It may be possible that I returned the release of the lien to Mr. Phillips; but I have no recollection of it." (Print. Rec., p. 20.) Phillips says: It was never returned to him; that he does not know where it is; that Bigelow told him that he (Bigelow) had it (Rec., p. 32), and Bigelow admits so telling him (p. 27) The paper was never recorded in the clerk's office.

It is claimed by the appellees to be lost or mislaid. A writing, purporting to be a copy, is filed in this suit as a substantial copy. (Print. Rec., p. 8.) This copy is made

from memory, and is sought to be proved by Bigelow's testimony based on memory. (Print. Rec., p. 25, orig. 91.) It is dated January 10th, 1873; the date is under the pleadings, an important essential of the paper. The telegram of November 19th to Phillips, from Bigelow, in Hartford, (first disclosed to Bigelow, in cross-examination), shows the date given to the alleged substantial copy to be a wrong date. Gilbert, the debtor, never saw the paper, and never heard of it till after this suit. Boughton and Moore, his vendees, never heard of it till, at least, two months after the deed to them from Gilbert. Phillips speaks of having given such a paper to Bigelow, at his (Bigelow's) suggestion. He says: I think I gave him such release. When he was about to start to Hartford with the abstract, he suggested to me it would be necessary to have a release of lien to place in the hands of the company to give them authority to release the lien, before the loan could be made to me. That was to be used only if the loan was made to me, and returned, in the event of my not getting the loan; and to remain on the property until my claim was satisfied." A formal release addressed to the clerk of court to be recorded, was not necessary till the money was ready to be paid; and it is probable that the paper was in the form of a letter to the company, since it was to give *them authority* to release the lien. The alleged copy filed assumes that the original paper was addressed to the clerk of the court, and, in this particular, is probably incorrect, as it certainly is as to its date; the whole thing being fabricated from a memory demonstrated to be imperfect. The writing itself, whatever it was, is not before the court. We will here say, there was no explanation given as to its supposed loss; no foundation laid for the introduction of secondary evidence. That objection was made to the testimony, and that the attempted parol proof is unsatisfactory. The said writing kept company with the abstract procured by Phil-

lips. From the evidence of appellees, it would seem that the abstract has not been destroyed, and is under their control. It does not appear when this writing and the abstract parted company.

Phillips did not complete the purchase of the property from Eastwood. He did not comply with any of the terms of sale. Eastwood did not convey to him. Phillips had the right to complete his purchase. Eastwood, as trustee, had the power to defeat this right. Phillips said, in Eastwood's office (see Moore's testimony, Print. Rec., 18, orig., 62), that the claim of Eastwood, secured by the deed of trust under which he bought, was unjust and usurious, and that if the property were to come into his (Phillips') possession, he would not pay the claim. From this, it would seem that Phillips, at this time, contemplated the completion of his purchase of the property. Upon this, Eastwood told Gilbert that the check Phillips had given him, as trustee, had not been paid, and that he (Gilbert) could have the property by making arrangements with Boughton & Moore, which, Gilbert says, he did do. (Print. Rec., p. 29, orig., 157.) Moore, whose testimony was taken for the defendants, tells us the arrangement. He says that Gilbert owed Boughton & Moore a large sum of money, and that he offered them these houses, subject to legal incumbrances; the margin to be credited on his, Gilbert's account; that Boughton & Moore "agreed to take the houses as they stood, provided he (Gilbert) would substantiate the representations he made as to the incumbrances, and that Mr. Phillips would carry out his contract."

What representations Gilbert made to Moore as to the incumbrances, does not appear by Moore's testimony, or otherwise, but by Gilbert's deposition, it is shown that at this time, which was in December, 1872, Gilbert was not on the best terms with Phillips; that he claimed that there was nothing due Phillips, and that Phillips had filed

what he terms a "bogus lien" of $27,000 against him, when he did not owe him a dollar; that the filing of the same greatly injured his credit (Rec., p. 29); that a sale had been made by Eastwood under the deed of trust, at which sale the property was "struck off" to Mr. Phillips; that he, Gilbert, believed the sale to be a collusion between the said Eastwood and the said Phillips; that he, Gilbert, was present at the sale, and attempted to buy in the property.

It is clear that Gilbert did not tell Moore all he knew about the status of the property, for Moore went to Eastwood's office and there learned the situation of affairs, after an interview there with Phillips. (Rec., p 18, orig., 61 and 62.)

Moore thus heard the Phillips' side of the controversy before he had entered into any arrangement; Gilbert then "represented that Eastwood had his, Gilbert's, paper for a very large amount, and, in any breach between him and Eastwood the latter had it in his power to ruin him;" and, thereupon he begged Moore to make whatever arrangements Boughton and himself could to have the property transferred to them without suit or controversy. (Rec., p. 18.) Gilbert had threatened Eastwood with a suit to set aside the sale to Phillips. Boughton and Moore then concluded to make such terms as would not compromise them in the future, and would allow the houses to be completed and Gilbert's interest credited on his indebtedness to them. (Printed Rec., p. 18, Moore's testimony.) Boughton and Moore, by a previous arrangement to meet Phillips (Rec., 14, orig. 49), then called to see Phillips in Eastwood's office, and there, in the presence of Charles Kennedy, who, at the sale, was auctioneer, and Eastwood, who was secured by the trust, persuaded Phillips to let them have the property, and not take a deed. They stated they would get the loan of $36,000 on the property and pay off the amount due him at

the time. Phillips, at first, refused. Moore urged the hardship in the case, saying he thought it hard that he (Phillips) should want to hold the property, and thought he ought to be satisfied with the amount coming to him. Moore then promised that Phillips should be paid from the loan, the $4,000 and $3,000 note then due and unpaid. Bigelow and Moore both stated to him there would be, after paying him up the $7,000, about $9,000 to apply to the completion of the houses. (Phillips' testimony, Rec., p. 11, orig. 35.) J. C. Eastwood says the amount mentioned by Phillips, as due him, was not disputed by Boughton and Moore, and that it seemed to be satisfactory; that the claims spoken of that Boughton and Moore were to pay, were the deed of trust note that Eastwood held from Gilbert, and the claim of Phillips for services performed, and material furnished for the houses. (Rec., p. 15.)

Mr. Phillips did not give up his right to the houses by virtue of his bid at public sale—his claim to them, as J. C. Eastwood calls it—until he was fully assured by all parties that the claim for work done, covered by the lien, was to be paid out of a loan which Boughton and Moore expected to get on the security of the houses. Moore says that on or about the 27th day of December he had agreed to take Phillips' contract as it stood between him and Gilbert. (Rec., p. 18, orig. p. 64.) Phillips then went to the office of Boughton and Moore, and the matter was talked over. Boughton approved. The details were arranged by Bigelow. (Rec., p. 19, orig. 66.) Phillips was to complete the houses in the manner and on the terms made between him and Gilbert—except that any difference in cost of material which had risen in value since the date of Gilbert's contract was to be paid for by Boughton and Moore—and Phillips was to be paid, as the work progressed, by drafts on the Insurance Company making the loan, not to exceed $1,000 every two weeks. (Printed

Rec., p. 18, 61.) Boughton and Moore had, prior to this time, received a deed from Gilbert. Boughton and Moore understood that Phillips was to be paid what was due by Gilbert to him prior to the time of their contract with him to complete the houses. (Rec., p. 18, orig. 64.) Phillips accepted the proposition of Boughton and Moore, and was to go on with the work on the houses. Phillips did not go to work immediately, on account of a delay in completing the loan from the Insurance Company. A loan of $6,000 on each of the six houses was effected with the Connecticut General Life Insurance Company. Moore says:

"Money arising from this loan was to be disbursed by the agent of the company, first to pay off the existing encumbrances and then toward the completion of the houses."

It seems that the Company did not advance any of the money at the time of accepting the deed of trust from Moore. Bigelow says that the encumbrances were paid by the Company; that the money coming from the loan was not necessarily to be disbursed by him; that it was understood by him, and by Boughton and Moore, that all that was due to Phillips on account of the lien was to have been paid out of the loan, and that he had never understood anything to the contrary. (Rec., 23, orig. 81 & 82.) E. G. Pumphrey says:

"That he heard Bigelow say, and Messrs Boughton and Moore say, that as soon as Mr. Eastwood was paid off they would draw a draught to pay Phillips his bill, or lien, on the houses." (Rec., 15.)

Bigelow himself says that he did not understand that Phillips' lien was released. (Rec., p. 20, orig. 70.) This was after Boughton and Moore obtained the loan. The Company knew of Phillips' lien.

Mr. Phillips continued work for Boughton & Moore after the loan was effected. The value of the same and of ma-

terials up to the filing of the bill in this suit, was over $4,000 additional, or over $16,000 altogether; for which additional he was paid $4,000; $2,000 in lumber, and $2,000 in money. He was to continue on the contract and receive $1,000 every two weeks, until $9,000 was paid on the contract; and then Boughton & Moore were to furnish other money outside the loan to complete the contract. His $4,000 due on account of the lien against Gilbert had not been paid. His note for $3,000 and interest, which he had transferred to one Martin (Rec., p. 11), was paid by the company; $14,373 was paid to Eastwood, and $4,500 to Burnstine. (Bigelow's testimony, Rec., p. 20.) This $9,000 spoken of was the residue of the $36,000, after paying the mechanic's lien and the amounts secured by the three deeds of trust. Phillips took $2,000 in lumber furnished Boughton & Moore by W. P. Cottrell & Co., lumber dealers. Phillips pressed Bigelow for the $4,000 due on account of lien, and which was to be first paid. (Pumphrey's testimony, p. 15.) Phillips went on with the work for Boughton & Moore as long as he was paid, but stopped work when Bigelow told him that no more money would be paid by the company (Rec., p. 11), and when he stopped work he had done more work than he had been paid for. He had received two drafts of $1,000 each; one on the 25th of March, 1873 (Rec., p. 10), and one in February or March (Rec., p. 15, orig., 52), and two orders on Cottrell & Co., for lumber. The foreman of Cottrell & Co., T. W. Smith, says: Boughton & Moore bought first, $1,000 worth of lumber, to be delivered on order of Mr. Phillips. In his conversation with Boughton & Moore, they stated that there was not money enough coming from the insurance company to finish the houses, and they wanted Cottrell & Co. to take a deed of trust for $1,000 on each house, as payment for lumber; the deed of trust to be given when the houses were so far advanced that they could raise money enough on them to take up Mr. Phillip's lien. At

this time there was $6,000 deed of trust on each house held by the insurance company. (Rec., p. 16.) The date of this proposition is not given by the witness, Smith. Bigelow, who, as Moore says, attended to all details, says that he (Bigelow) paid the $2,000 in lumber, which Phillips received (Rec. p. 20, orig., 73); that he paid it as well as the money, on account of work done after the loan to Boughton & Moore (p. 27), and that about April 28th, 1873, he wanted to reduce "the encumbrances on three of the houses to that only held by the company, namely: $6,000 to a house and lot; the object being to raise $3,000 in lumber by giving three second deeds of trust upon the property. The lumber was to be had of W. P. Cottrell." With this view, Bigelow himself wrote a release of Phillips' lien on three of the houses and lots, dated April 28th, 1873, and addressed to the clerk of the court, to be executed by Phillips, which he presented to Phillips, and which Phillips did not execute. (Rec., pp. 24 and 27, the paper being brought out in cross-examination.) He says he might have told Phillips that if he would execute a release of his lien, so that the company could come to the bottom upon upon these houses, that he would be shortly paid. (Rec., p. 24, orig., 89.)

We will here state, that concerning this paper which he acknowledged in his handwriting, Bigelow says: "I do not remember anything about the paper; and the only thing that I can see that would prompt me to get a paper of that kind executed, would be for the company to get the first lien of record. I cannot conceive now any other object."

Giving his testimony at a subsequent session, and on redirect, he says, as above, that it was written out by him for the purpose of securing Cottrell & Co. by second deeds of trust. When counsel for defendants put to him the leading question, which was objected to: "Wasn't the ob-

ject of this to save time in sending to Hartford for the other release?" Bigelow answered: "I have before stated that I was always aware of the fact that there was of record a lien of $27,000, and at the time in question (April 28th, 1873), it was known to me and the president of the company, Edward W. Parson, that the abstract and release of lien before mentioned were missing, and this release was written out for the purpose before mentioned, and because of the loss of the other. I do not mean to say, however, that if I had had the original I would have put it on record without first having consulted Mr. Phillips, because of a dispute about the amount due him."

Before the paper of April 28th, 1873, was exhibited to him in cross-examination, he had said that it was since June, 1873, that he first knew the alleged release of lien, which Phillips had given, was lost. (Rec., p. 24, orig. 87.) He does not attempt to explain why the paper did not embrace all the lots, if it were intended to supply the place of one which was lost, and which embraced all the lots and houses, and upon the faith of which he claims his company acted. It thus appears that the lien of Phillips was, on or about April 28th, 1873, an encumbrance on the property, and was so recognized by Boughton & Moore, who spoke to Thomas W. Smith (the witness), about the lien, and by the agent of the insurance company, who wanted to get a release of it as to part of the property.

Phillips not being paid this lien, quit work and afterwards filed the bill of complaint in this case, to enforce his lien on the property, making a party thereto the Connecticut Insurance Company, which, by the disposition of the property by Boughton & Moore, was mortgagee and virtually the owner.

The company files its answer, sworn to by Bigelow its agent. It admits that the loan was made in February, as alleged, upon lots 263 to 268, both inclusive, and says that

when the loan was made upon the security of said lots, the plaintiff, Wm. G. Phillips, executed and delivered to said company a release, in writing, of said lots from the effect of the operation of the lien filed against said lots, and that upon the faith of said release, the said company made the said loan to Boughton & Moore, and it says that plaintiff ought to be estopped from proceeding upon said claim for mechanics' lien. It alleges the loss of the writing.

This was put in issue by the replication, and the only testimony taken by the company was that of its agent, Bigelow, as to this so-called estoppel. The whole testimony shows that it was in November and not in February, and that it was before the lots, mentioned in the answer, had any existence as such, and before Boughton & Moore had any connection, whatever, with the property or any interest therein, that Phillips gave a paper alleged to be a release of lien, that the company knew for what purpose it was made and given, and never used it, that purpose failing; and never had its custody so as to record it, and that it could not have used it, without the consent of Mr. Phillips, except by the perpetration of a gross fraud, working a serious injury to him and a great profit to it; that it does not have it, cannot account for its supposed loss, and it says, through their agent testifying as a witness in its behalf, that it would not record the original if it had it, without first consulting Mr. Phillips. The company lent its money, subject to encumbrances, of which Phillips' lien was one; assumed to pay the encumbrances thereby, and actually withheld the money which it pretended to lend, undertaking itself to pay the encumbrances on the property.

The case came on to be heard and Mr. Justice Wylie referred the matter to a jury, which gave the verdict in favor of Phillips, as hereid before stated. The cause coming on again to be heard, the same justice dismissed

the bill. On appeal to General Term, the same justice delivered the opinion of the court, affirming the decree below. This opinion is contained in six lines in the report of the case in 2nd MacArthur, 419, and is as follows:

"The simple question in this case is, whether a me-
" chanic who had filed a lien upon a certain piece of
" property, and released it to enable the parties owning
" the land, to make a loan, can afterward claim the lien as
" against those who have advanced the money. We think
" not. The decree appealed from is, therefore, affirmed."

Act of Congress relating to Mechanics' Liens.

Thirty-fifth Congress, Sess. II., ch. 17, 1859. U. S. Statutes at Large, vol. 11th, pp. 376, 377, and 378.

AN ACT for the enforcement of Mechanic's Liens on Buildings, and so forth, in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That any person who shall hereafter, by virtue of any contract with the owner of any building, or with the agent of such owner, perform any labor upon, or furnish any materials, engine or machinery for the construction or repairing of such building, shall, upon filing the notice prescribed in section second of this act, have a lien upon such building and the lot of ground upon which the same is situated, for such labor done, or materials, engine, or machinery furnished, when the amount shall exceed twenty dollars.

SEC. 2. *And be it further enacted*, That any person wishing to avail aimself of this act, whether his claim be due or not, shall file in the office of the clerk of the Circuit Court for the District of Columbia, at any time after the commencement of the said building, and within three months after the completion of such building or repairs, a notice of his intention to hold a lien upon the property declared by this act liable to such lien, for the amount due or to become due to him, specifically setting forth the amount claimed. Upon his failure to do so, the lien shall be lost. The clerk aforesaid shall file and record such notice in a book provided for that purpose.

SEC. 3. *And be it further enacted*, That such lien shall cease to exist at the expiration of one year after the completion of the building or repairs, unless, before that time, an action to enforce the same shall have been commenced in the said circuit court by the person having such lien against the owner, with whom or with whose agent the contract was made, unless such claim be not due at the expiration of one year after such completion, in which case the action shall be commenced within three months after the same shall have become due.

SEC. 4. *And be it further enacted*, That the complaint of the plaintiff shall contain a brief statement of the contract on which the claim is founded, the amount due thereon, the time when the notice was filed with the clerk the time when the building was completed, if it be completed, with a description of the premises, and any other material facts, and shall pray that the premises may be sold and the proceeds of the sale applied to the discharge of the lien.

SEC. 5. *And be it further enacted*, That the summons shall be served as in other cases, or, instead of service by publication, it may be made by delivering a copy thereof to the person in possession of the premises. If the defendant shall have sold or disposed of the premises before the service of the summons, the court shall direct notice of the proceedings to be served on the purchaser, or his agent for the premises, who may thereupon, if he desire it, be made a party defendant in the action.

SEC. 6. *And be it further enacted*, That the proceedings in an action to enforce such lien shall be the same as in other actions, except as otherwise provided in this act; and if judgment be rendered for the plaintiff, he may have execution issued against the premises, and thereupon the marshall shall proceed as upon other executions upon real property.

SEC. 7. *And be it further enacted*, That the liens created in pursuance of the provisions of this act shall have precedence over all other liens or encumbrances which attached upon the premises subsequent to the time at which said notice was given. If, upon the sale of the premises on execution, the proceeds be insufficient to pay all such liens, the court shall order them to be paid in proportion to the

amount, respectively, due to each, and any other property of the defendant not exempt from execution may be sold to satisfy such execution.

* * * * * *

SEC. 10. *And be it further enacted*, That whenever any person having a lien, by virtue of the provisions of this act, shall have received satisfaction for his claim, and the cost of his proceedings thereon, he shall, upon the request of any person interested, and upon the payment or tender of the costs of entering satisfaction, within six days after such payment or tender, enter satisfaction of his demand in the office of the clerk aforesaid; and upon failure to do so he shall forfeit and pay fifty dollars to the party aggrieved, and all damages which he may have sustained in consequence of such failure or neglect.

SEC. 11. *And be it further enacted*, That in all proceedings, commenced under this act, the defendant may file a written undertaking, with surety to be approved by the court, to the effect that he will pay the judgment that may be recovered, and costs, and thereby release his property from the lien hereby created.

* * * * * *

SEC. 14. *And be it further enacted*, That the act entitled "An act to secure to mechanics and others, &c.," approved March second, eighteen hundred and thirty-three, and all other acts and parts of acts inconsistent with the provisions of this act, be, and the same are hereby, repealed, and this act shall take effect from the date of its passage. Approved, February 2, 1859.

Thirty-ninth Congress, Sess. II, Chap. 64, 1867. U. S. Statutes at Large, Vol. 14, pp. 403 and 404.

AN ACT to amend the law of the District of Columbia in relation to judicial proceedings therein.

Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled, Section 7. * * * * That publication may be substituted for personal service of process upon any defendant who cannot be found, in suits for partition, divorce, by attachment, for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens and all other liens against real or personal property, and in all actions at law

or in equity which have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court.

SEC. 10. *And be it further enacted*, That the proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand, against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law.

SEC. 11. *And be it further enacted*, That in actions against foreign corporations doing business in the District of Columbia, all process may be served on the agent of such corporation or person conducting its business aforesaid, or in case he is absent and cannot be found, by leaving a copy thereof at the principal place of business in the District, and such service shall be effectual to bring the corporation before the court.

A further act was passed in 1870, for the protection of sub-contractors, Stat. at large, vol. 16, p. 183.

The whole of this legislation was, after the institution of this suit, incorporated into the revised statutes of the U. S., relating to the District of Columbia. See Chapter 20, §§ 692 to 712 inclusive, and §§ 787, 790 and 808.

Assignment of errors.

I. The court erred in dismissing the bill—

(*a.*) As to all the parties served with process.

(*b.*) As to the defendant, Benjamin F. Gilbert.

(*c.*) As to the Connecticut General Life Insurance Company.

II. The court so erred, because the bill stated a proper case for the relief sought; and,

(*a.*) A decree should have been passed, in favor of complainant, for $4,020, on account of his claim for lien; and,

(*b.*) A decree should have been passed for the sale of the

property, and the payment of complainant's claim out of the proceeds of such sale.

III. The court so erred, because the claim for mechanic's lien, set forth in the bill and objected to in defendant's pleadings, as insufficient and void, for the reason that it is made in gross upon six separate lots of ground without specifically setting forth the amount claimed on each building and lot for material and work furnished thereon—was sufficient and valid, the claim being against the same owner of all the buildings, under one contract as to all, for the building of the same at one and the same time, and for a gross sum, and against a row of buildings built at the same time on contiguous or adjoining lots.

IV. The court so erred, because it was established by the proofs that Gilbert was indebted to the complainant on account of said mechanic's lien.

V. The court so erred, because the lien was not released as averred or as claimed in the amended answer of Gilbert.

VI. (*a.*) The court so erred because the alleged release of lien, set up by the answer of the Connecticut General Life Insurance Company, as executed and delivered to said company by said Phillips, was not delivered at the time or under the circumstances stated by the said answer, and because it appears that the writing alleged to be a release of lien was given to one Bigelow, the agent of the company, to be used by the company only in the event of a loan being made by said company to the complainant, in case he should become the owner of the property and borrow money upon the security thereof, which event did not happen; and, further, because it appears that said company, by its acts and the conduct of its agent, as shown by the testimony, did not treat the said writing as a release of the lien, but, in transactions touching said property, dealt with it as though the property was still subject to said claim for lien.

(*b.*) Because there is no proper or legal proof that said writing, purporting to be a release of lien, or an authority to release a lien, was in the form or nature of the alleged release, as stated in the answer of the insurance company.

(*c.*) Because there can be no such estoppel, as alleged in the answer of the company, even if the circumstances under which it is stated the loan was made be true, for that it appears by the proofs that the company did not at the time lend the money, as alleged, but withheld the same, and itself undertook to disburse the amount of the loan in the payment of the encumbrances on the property and towards the finishing of the buildings, and that it was notified by the complainant of his claim, and the amount due thereon, before the disbursement of the whole amount and while there was sufficient money retained by the company to pay complainants' claim after it had paid all prior claims on the property.

(*d.*) Because the complainant, if estopped, as to the insurance company, by the alleged circumstances stated in its answer, was still entitled to a decree for the relief asked, saving the rights of the company in the property or in the proceeds of the sale thereof.

(*e.*) Because, in the opinion of the court (2 MacArthur, 419—see opinion copied in statement in this case), it assumes that the simple question in the case was whether a mechanic, who had filed a lien upon a certain piece of property and released it to enable the parties owning the land to make a loan, can afterwards claim the lien as against those who have advanced the money, and upon such assumption affirming the decree of the Special Term dismissing the bill.

VII. The court so erred, because the proofs do not establish any facts which can operate as a waiver, or discharge, or abandonment of the lien of complainant, or which can make it inequitable for him to enforce his lien.

VIII. The court so erred, because the undertaking, entitled as of this suit and filed after the institution of the same (See Rec., p. 5, orig. 14), did not deprive the court of the jurisdiction to award relief in the premises, nor in any wise abridge its jurisdiction.

IX. The court so erred because the bill, if dismissed, should have been dismissed without prejudice.

Brief for Appellant.

Four issues are raised by the pleadings in this cause.

I.

The demurrer of Boughton & Moore and the answer of Gilbert, make the point that the *notice of lien* in this case is insufficient in law, because the claim is made in gross upon separate buildings, situate upon separate lots, without specifically stating the amount claimed on each house for the work done and materials furnished thereon.

The contract between Phillips and Gilbert, as shown in the notice of lien, was entire. The contract was with but the one owner; the houses were to be built on adjoining lots, at the same time, as an entire work, and for a gross sum, and were in fact built at the same time.

The notice is therefore, valid and sufficient.

Phillips on Mechanics' Liens, § 369, and cases cited.

The court below has repeatedly enforced liens created by such notices as that filed in this case.

II.

The answer of Gilbert, filed September 9, 1873, puts in issue the fact whether there was anything due from him to Phillips on account of the work done and materials furnished in the construction of said houses as claimed in said notice of lien, and if anything, how much.

The jury which tried the issues sent to the circuit court, found that there was due from Gilbert to Phillips on this account, $4,020.

The evidence filed in this cause sustains this finding of the jury. The statement of appellant refers to this evidence.

III.

The amended answer of Gilbert, filed December 24, 1873, puts in issue the fact whether the lien, to enforce which this suit was brought, was fully discharged and released by the complainant in writing before the suit was brought.

The averment of such a release is based, by Gilbert, on information and belief, and in his testimony he says he only knew from hearsay, that he understood so from Boughton and Moore; and by Moore's testimony, it appears that Boughton and Moore heard it from Bigelow, and after the loan to them was made, and, therefore, after 1st of February, 1873. Gilbert's only evidence in this behalf, to support his answer, is his own hearsay testimony, objected to at the time, and given in response to the question—

"Do you know anything about Phillips' having executed and delivered a release of the lien claimed by him on these lots for the purpose of getting a loan from the Connecticut Life Insurance Company?"

And it is clear from the evidence that Phillips applied for a loan prior to November 19th, 1872, and before Boughton and Moore had any interest whatever in the property; and that, at the time of his application, Phillips furnished an abstract to the company, showing the lien as existing on the property. It would seem, however, from this hearsay testimony, that the writing Gilbert had in view as effecting a release, is the same which the Insurance Company set forth in its answer, filed on the 19th of December, 1873. As to this supposed release, Phillips' testimony is explicit—is not contradicted, and is supported by all the circumstances of

the case, and even by Bigelow's testimony. Phillips says it was a writing to authorize the Company to release, and was entrusted to Bigelow to be used only in case of a loan to him, Phillips, and that the lien was to remain on the property, in case no loan was made to him, until his claim was satisfied; that the writing was given at the suggestion of Bigelow. The Company does not claim that the said writing has the effect of releasing the property from the operation of the lien, as against Gilbert and others, but that it estops Phillips from asserting any rights to the property as against the Company, it claiming to have been misled by the paper. Phillips never represented to anyone that the lien was discharged. No consideration ever moved him to make the alleged discharge. The writing was not recorded in the Clerk's Office. Gilbert was certainly not misled by the writing, for he had sold the property to Boughton and Moore before he had ever heard of it; and they took the property from him with the knowledge of Phillips' claim for lien—subject to encumbrances, Phillips' claim for lien being duly recorded.

Indeed, from the chronological order of the pleadings, it would seem that this defence first occurred to Gilbert after the filing of the Company's answer. If he had known of it on September 9th, when he filed his first answer, he would certainly have incorporated the defence in that answer. It is a significant circumstance, that this defense is made only after the witness Bigelow found in his safe a release of a lien by Phillips of other property, which he thought, at the time, and for some time thereafter, was a release of the lien in question. The date of this supposed finding of the paper was about three or four months before the taking of Bigelow's testimony (Printed Rec., p. 27, orig. 97), and this testimony was given on the 12th of March, 1874. The time the answer of the Company was filed and the amended answer of Gilbert was, therefore, about the time that Bigelow

thought he had found the release of lien. Can it be supposed that the parties would have forgotten the existence of so important a paper? It is clear that the parties did not act on the faith of this writing, and that there was no intention on the part of Phillips to release his lien. No steps were taken to perfect such alleged discharge.

The written release of lien not being given, either to the debtor or his agent or to the proper officer of the court, to whom it was directed, the discharge of the lien was not complete.

Phillips on Mech. Liens, § 295.

Wetherill vs. *Harbert*, 2 Barr; Penn., 348.

The question, whether a mechanic's lien is "displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all surrounding circumstances," says Mr. Justice MILLER, delivering this court's opinion in *Grant* vs. *Strong*, 18 Wall., 624.

IV.

The answer of the Insurance Company presents the case of an alleged estoppel. We think it clear, from the testimony, as shown by our statement of this case, that the company cannot claim any benefit on the score of estoppel. It acted in all the transactions concerning this matter, through its agent, J. G. Bigelow, who has testified in the case; he files and swears to its answer, and we think it clear, from his testimony, that the company knew of the existence of Phillips' lien; knew at the time of the loan to Boughton & Moore, that it was still subsisting and of record. The company did not advance the money to Boughton & Moore, at the time of the deed of trust from them, but retained it for the very purpose of first paying off encumbrances on the property, prior to the deeds of trust made by Boughton & Moore. The company had notice, prior to the loan to Boughton & Moore, that Phillips claimed to be due to

him $7,000, (of which $3,000 was an unpaid note), on account of his lien for $27,000. After the date of the so-called loan, and while the company still retained, after paying all encumbrances, prior to Phillips' lien, much more than enough to pay him the amount claimed by him, its agent, Bigelow, as appears from E. G. Pumphrey's statement, was pressed by Phillips for the payment of his lien for $4,000, and he, Bigelow, who practically disbursed the money secured by deed of trust from Boughton & Moore, promised to pay it from the loan. This was made in Pumphrey's presence, and Bigelow, in his testimony, when asked, "was it not understood by you, and by Boughton & Moore, that the money due to Mr. Phillips, on account of lien, should be paid out of this loan to Boughton & Moore?" Answers, "Yes, sir; all that was due to Mr. Phillips was to have been paid out of the loan; I never understood anything to the contrary."

This promise in the presence of Pumphrey was in February or March, 1873; but Bigelow had not paid Phillips on April 28, 1873, when he (Bigelow) wrote a release of Phillip's lien for a part of the property in controversy, and presented it to Phillips to be executed by him. The promise to pay Phillips the amount of his lien out of the claim was never kept; it appears, however, that out of the money, all of which was to have been applied in the payment of incumbrances, and towards the finishing of the houses, $4,000 was misapplied by Bigelow. The testimony of Bigelow is painfully contradictory. It is irreconcilable.

That this company is chargeable with the notice and knowledge which its agent had in the premises, has been decided by this court in a case not yet reported, No. 240, Oct. Term, 1877, where this very company was appellant, and in which this very agent figured.

Connecticut General Life Insurance Co. vs. *Bernard Burnstine.* Mr. Justice HUNT delivered the opinion of the court.

In that case the company made a loan of $12,000 to one Hubbard, and withheld enough of the loan to pay off a prior deed of trust which it did not do until compelled so to do by this court. In that case there was a fraudulent release and the bill was to reinstate the deed of trust. The court says:

"We think that upon the evidence it is too plain for discussion that in February, 1873, and afterwards, Bigelow was agent of the Insurance Company in disbursing its moneys to Hubbard and others, in perfecting its title to the lots covered by the larger deed of trust, and in paying out the money reserved for the indemnity of the Ormes or Burnstine security; and that he received the release in question for and in behalf of the company, held it in that capacity, and at a convenient time, delivered it to its president as a muniment of title."

This case was decided in the teeth of Bigelow's testimony.

The attempt on the part of the company to use the paper given by Phillips to Bigelow, and which is alleged to have been a release of the lien for the purpose of defeating the enforcement by Philips of his lien, ought not to be countenanced by the court, because it would be a fraudulent use of the paper.

A fraudulent release does not work a discharge of the property from the effects of the lien.

Canal Company vs. *Gordon*, 6 Wal., 567.

That the agreement to pay Philips out of the loan, if not performed, does not prevent a resort to the enforcement of the lien, see opinion of this court by Mr Justice CLIFFORD.

McMurray vs. *Brown*, 91 U. S. Rep., S. C., p. 266.

The lien of a mechanic is not waived or released except by plain acts.

Hindman vs. *Lybrand*, 14 S. & R., 32.

It appears, from the report of the case in the court below in 2 MacArthur, that defendants contended there—

1st. That Phillips practically joined in the conveyance from Gilbert to Boughton & Moore, and is, therefore estopped from setting up his lien against them.

2d. That he accepted the promise of Boughton & Moore to pay for the work done for Gilbert, and thereby waived and discharged his lien.

It is very plain that Phillips had no interest to convey to Boughton & Moore, and that he never attempted or intended to convey anything to them. That he had nothing to do with the transfer of the title to them from Gilbert. That they accepted the deed on the importunate entreaties of Gilbert, and to save a debt due to them from Gilbert, and took the property subject to encumbrances, and promised from the loan to pay Phillips what was due him from Gilbert. They cannot, therefore, be hurt by the enforcement of the lien.

The promise of Boughton & Moore to pay Phillips from the loan was not known to Gilbert, the debtor.

He says, in answer to the question—

"Did Phillips agree to take Boughton & Moore for pay for this work?

"I know nothing about it." (Rec., p. 29.)

It is clear then that no *novation* of the contract occurred, whatever arrangement took place, and that the case assumed by the defendants to exist here is clearly distinguished from the case, where the debtor gives the obligation of third persons in payment or settlement of his indebtedness.

We respectfully submit that the decree dismissing the bill is erroneous, and should be reversed; and that we are entitled to the relief prayed; and by virtue of the Revised Statutes, D. C., § 808, to a personal decree, and to relief against the insurance company for the payment of the claim.

GEO. F. APPLEBY,
W. E. EDMONSTON,
for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 87.

WILLIAM G. PHILLIPS, APPELLANT,

vs.

BENJAMIN F. GILBERT, WILLIAM H. WARD, HENRY H. DUDLEY, THOMAS MARTIN, THE GERMAN-AMERICAN SAVINGS BANK, HORACE BOUGHTON, AND W. BOWEN MOORE, EDWARD W. PARSONS AND ROBERT E. DAY, AND THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY, APPELLEES.

BRIEF FOR APPELLEES.

ENOCH TOTTEN,
For Appellees.

S. R. BOND,
For Life Insurance Co., Appellee.

Judd & Detweiler, Printers.

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BRIEF OF APPELLEES.

The bill in this cause was filed in the supreme court of the District of Columbia to enforce a mechanic's lien. The cause was heard in special term on the pleadings and proofs, and a decree was entered dismissing the bill. An appeal was taken to the general term, where the decree of the special term was affirmed, from which latter decree an appeal was taken to this Court.

STATEMENT OF FACTS.

1. In August, 1871, the complainant, now appellant, entered into an agreement with the defendant, Gilbert, to erect six dwelling houses on the lots described in the bill, for which he was to be paid at the rate of $5,200 for each of four of the houses, and $5,700 for each of the other two.

On May 23, 1872, the complainant filed in the clerk's office a notice of his intention to hold a lien on the property for labor and materials to the amount of $27,540.

Before that time the property had been heavily incumbered by Gilbert; and in November, 1872, a sale thereof was made by virtue of certain deeds of trust held by one Eastwood, and the complainant became the purchaser at such sale.

After the complainant had purchased the property, he entered into negotiations for a loan of $36,000 from the defendant, the Connecticut General Life Insurance Company, to be secured by trust deeds on the premises in question. These negotiations were conducted by the complainant with J. G. Bigelow, as the agent of the Insurance Company in Washington. The abstract of title to the property had been furnished to Bigelow by the complainant, and was taken to the Insurance Company at Hartford. With the abstract was also taken a formal release and discharge, duly executed by the plaintiff, of the lots described in the bill, from the effect and operation of the claim for mechanic's lien filed by him.

On this point J. G. Bigelow testifies, (p. 9 of Printed Record:)

"Accordingly, Phillips wrote a release of that lien,

"signed by himself, which, together with the abstract I "took to Hartford, Connecticut, and presented the same to "the president of the Connecticut General Life Insurance "Company."

And on p. 10 he says:

"The release was delivered to me by Phillips to show "that the lien was released. * * * The company made "the loan on the faith of the release of the lien."

The complainant, himself, in answer to a question put by his counsel as to whether he gave the release of lien to Bigelow, says, (p. 32 of Record:) "I think I gave him such release," and lower down on the same page he says he gave the release to Bigelow, and that it has never been returned to him.

The sworn answer of the company alleges that the release has been lost or mislaid, and that a substantial copy of the same is filed with its answer. This is corroborated by the testimony of Bigelow, (pp. 24, 25, and 27 of Record.)

The copy filed is as follows:

"WASHINGTON, D. C., *January* 10, 1873.

"*To the Clerk of the Circuit Court of the District of Columbia:*

"SIR: You are respectfully requested to release the property owned by Benjamin F. Gilbert, and located on lots 123, 124, 125, 126, 127, 128, and part of 129, in Gilbert's subdivision of square 675, from the mechanic's lien filed by me on or about the 23d day of May, 1872.

"W. G. PHILLIPS."

The execution and delivery of a release being proven its form is not essential.

2. But before the negotiations for the loan had been com-

pleted, and before the premises had been conveyed to the complainant by the trustee who made the sale, Gilbert effected a sale thereof to Messrs. Boughton & Moore. Gilbert at the time was largely indebted to the said firm, and they agreed to buy the property from him, pay off whatever might be found due to Phillipps from Gilbert for the work done and materials furnished by him under the agreement between them, and also to remove the incumbrance put on the property by Gilbert, and then to complete the houses, sell them and apply any surplus there might be to the reduction of the debt due from Gilbert to them. The complainant assented to this arrangement, and abandoned the purchase he had made, and thereupon the lots were conveyed in fee by Gilbert to Boughton & Moore. At about the same time, and in consummation of the same arrangement, a bargain was made between the complainant and Boughton & Moore, whereby the complainant agreed to complete the buildings for Boughton & Moore, and they agreed to pay him the price originally agreed upon between him and Gilbert, with an allowance for the enhanced price of materials, deducting such payments as had been made by Gilbert prior to that time. The complainant asserted that Gilbert was in his debt for materials and work to the extent of $4,000.00, but Gilbert claimed that he was entitled to more credits than the complainant had given him. It was also a part of the agreement between the plaintiff and Boughton & Moore, and it was also understood and approved by the agent of the Insurance Company, that Boughton & Moore should take up the negotiations for the loan where complainant stopped, and procure the loan on the same property.

It was a condition of making the loan, imposed by the Insurance Company, that out of the fund the prior incumbrances should be removed, in order that its security might constitute the first incumbrance. And it was part of the agreement between the complainant and Boughton & Moore, that after the debts secured by deeds of trust on the ground had been paid, the complainant should be paid out of the loan whatever sum might be found due to him for work done and materials furnished for Gilbert. It was also agreed that a certain note for $3,000 made by Gilbert, and given to complainant, and then overdue and unpaid, should also be taken up, and that the balance of the loan should be paid to him for the materials furnished and labor performed by him for Boughton & Moore, under his agreement with them.

The Insurance Company, in February, 1873, relying upon the abstract of title and the release of the lien of the complainant held by it, made the loan of $36,000 upon the security of the property. The complainant thereupon went to work to complete the houses for Boughton & Moore as agreed upon between them.

He proceeded with the work until some time about the 11th of June, 1873, and then abandoned the houses and filed his bill to enforce the old claim for lien filed against Gilbert.

Out of the loan was paid the sum of $18,873 to take up outstanding deeds of trust on the lots, the over-due note for $3,000, as agreed, and to the complainant the sum of $4,000 up to the date of the commencement of this suit, and $2,000 subsequently.

As to these facts there is substantial, if not complete, concurrence of testimony.

Testimony of complainant, pp. 11 and 12 of record.
" " Kennedy and Eastwood, p. 14 " "
" " W. B. Moore, pp. 17 and 18 " "
" " J. G. Bigelow, pp. 19 and 20 " "

3. In June, 1873, soon after the commencement of the suit, an undertaking was filed under the statute whereby the property became released from the alleged lien. (P. 5 of Record.)

Points and Authorities.

I.

The property having been released by the filing of the undertaking, approved by the court, as provided by section 708 of the Revised Statutes of the United States relating to the District of Columbia, the principal question remaining for argument is whether or not, at the commencement of the suit, the complainant had a valid and existing lien under his contract with Gilbert, so that a decree should have been rendered to that effect.

It is contended on behalf of the appellees that such claim cannot be maintained, and that there was no error in the decree below, because—

First. The lien was discharged by the delivery of the release to the Insurance Company.

It was upon the faith of this release that the company was induced to part with its money, of which the complain-

ant received a considerable part, and he is estopped from setting up the lien.

Bigelow on Estoppel, 369.

It is true that at the time of the execution and delivery of the release the expectation was that the loan would be made to complainant, and he testifies that it was to be used only in case the loan should be so made. But Bigelow says this was not mentioned, (p 26); Moore says (p. 18) that the claim for lien was not considered one of the incumbrances that were to be paid off as such, and was not to stand in the way of Boughton & Moore getting the loan. (P. 19.) Upon the transfer of the property to them the same loan for which negotiations had been begun for complainant, on the faith of the release, was to be perfected for them; and during all the subsequent transactions the complainant made no effort to recall the release—never declared his intention of relying upon a claim for lien—but looked only to the promise of Boughton & Moore to pay him out of the money they should get on the loan. If he relied on his lien he was becoming perfectly secure as the prior incumbrances were paid off, and would have been more anxious about the payment of what was accruing due to him for the work he was doing for Boughton & Moore than for what was due from Gilbert; but the reverse was the case, and he stopped work because they would not pay that which, by the position now taken in his behalf, was then the first lien on the property, worth several times the amount claimed.

Second. In addition to this release of lien the complainant, having purchased the property and made arrangements for the loan, consented, in lieu of taking a conveyance under

his purchase, to allow the property to be conveyed to Boughton & Moore, and for them to take the loan upon the same terms and complete the work on the houses. He practically joined in the conveyance from Gilbert to Boughton & Moore, and therefore is estopped from setting up his lien against them.

Phillips on Mech. Liens, § 273.
Bigelow on Estoppel, 369.
Doub *vs.* Barnes, 4 Gill, 1.
Alexander *vs.* Slavens, 7 B. Mon., 356.

Third. The complainant accepted the promise of Boughton & Moore to pay for the work done and materials furnished by him for Gilbert, as well as for the completion of the houses for them, and actually received part payment by virtue of that promise.

The arrangement and relations between him and them were totally inconsistent with the intention of holding a lien, but showed a reliance upon their promise to pay him the amount of his claim, partly out of the loan and partly out of other resources of their own. (Complainant, p. 12.)

By accepting the personal obligation of third persons to pay the debt he waived and discharged his lien, if one existed in his favor after the delivery of the release and the conveyance of the property to Boughton & Moore.

Strong *vs.* Grant, 18 Wall., 623.
Brady *vs.* Anderson, 24 Ill., 113.
Kingley *vs.* Thomas, 28 Ill., 505.
Bennerson *vs.* Thayer, 23 Ill., 374.
Whiting *vs.* Joslin, 108 Mass., 103.

4 Kent's Com., 153.
2 Sugden on Vendors, 59.
Brown *vs.* Gilman, 1 Mason, 212. — 4 Mich, 255.
Fish *vs.* Howland, 1 Paige, 20.
Williams *vs.* Roberts, 5 Ohio, 35.
Conover *vs.* Warren, 1 Gilm, 501.

II.

As to the Insurance Company in no possible view of the case can this bill be maintained.

First. For the reasons stated in the foregoing points.

Second. Because, if it should be held that complainant had a lien at the time of the institution of this suit, the property in question was released therefrom by the filing of "a written undertaking, with surety, approved by the court," as provided by section 708, chapter 20, of the Revised Statutes of the United States relating to the District of Columbia, providing for mechanics' liens, which is as follows:

"SEC. 708. In all proceedings commenced under this chapter, the defendant may file a written undertaking, with surety, to be approved by the court, to the effect that he will pay the judgment that may be recovered, and costs, and thereby release his property from the lien hereby created."

The undertaking, with the approval of the court, was filed in these proceedings, and is found on page five of the printed record. This operated, *per se*, as a discharge of the lien.

Phillips on Mech. Liens, § 303.

That this was so regarded in the further conduct of the cause on behalf of the complainants, is evidenced by the fact that no service of process was made on the defendants Parson and Day, who held the legal title to the property under the deeds of trust to secure the company, without which service no sale of the property could be decreed.

Third. The object and prayers of the bill are only for the assertion of the lien and a sale of the property. The Insurance Company is made a party simply as an encumbrancer, as were several other defendants.

No personal judgment on decree is asked against the company, and none could be rendered. The special statute relating to mechanics' liens (chapter 20, Rev. Sts. of D. C.) contains no provision for a judgment or decree *in personam*, but simply for proceedings *in rem*. Sec. 808 of the Revised Statutes of D. C. contains a general provision in regard to the enforcement of liens, and provides that "the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution therefor as at law." "The defendant," as here used, means the party with whom the contract was made by the mechanic, or material-man, and against whom he has "his demand" under that contract.

Phillips on Mech. Liens, § 447.

This cannot be more strongly stated than by quoting from the printed brief in behalf of the complainant on the argument before the general term, which contained the following disclaimer:

"As the insurance company was only interested as a sub-
"sequent incumbrancer on the *property* on which the lien
"was filed, as the *property* was unquestionably released from
"the lien by the undertaking filed in this cause on June 25,
"1873, nearly six months before the filing of the answer of
"the company, there could not, at the time of said answer,
"and cannot now, be any conflict of interest between the
"company and the complainant, for after the approval and
"filing of the undertaking given for the release of the lien
"of complainant, the only remedy left to him was a decree
"against Gilbert for the amount due by Gilbert to the com-
"plainant on account of said claim for lien, as provided by
"Rev. Stat., § 808, (act of Congress, 22 February, 1867,)
"in case of proceedings to enforce liens, which decree could
"in no way prejudice the insurance company or interfere
"with its incumbrance on the property."

Neither in the bill nor at the bar has any claim been made of a personal liability of the company, until now, and as the undertaking for the discharge of the lien was filed and took effect almost at the inception of the suit and before any testimony was taken, it was not conceived by the company that there was any occasion to go into a defense so foreign to the apparent object of the suit. The only question involved was whether, at the time of the institution of the suit, there was a lien, and, if so, for what amount. The undertaking became substituted in place of the property, as security for the amount of any lien that might be established. No new or further issues can be involved in the case here.

ENOCH TOTTEN,
For Appellees.

S. R. BOND,
For Life Insurance Co., Appellee.